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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

MARCH, 1904, TO MARCH, 1905

F. W. AMES
REPORTER

VOLUME 13

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OFFICERS OF THE COURT DURING THE PERIOD OF
THESE REPORTS.

HON. N. C. YOUNG, Chief Justice.¹

HON. D. E. MORGAN, Chief Justice.

HON. JOHN M. COCHRANE, Judge.²

HON. N. C. YOUNG, Judge.

HON. EDWARD ENGERUD, Judge.³

R. D. HOSKINS, Clerk.

F. W. AMES, Reporter.

¹Term expired December 31, 1904.

²Died July 20, 1904.

³Appointed August 9, 1904.

CONSTITUTION OF NORTH DAKOTA.

SEC. 101. Where a judgment or decree is reversed or confirmed by the Supreme Court, every point fairly arising upon the record of the case shall be considered and decided, and the reasons therefor shall be concisely stated in writing, signed by the judges concurring, filed in the office of the clerk of the Supreme Court and preserved with a record of the case. Any judge dissenting therefrom may give the reasons for his dissent in writing over his signature.

SEC. 102. It shall be the duty of the court to prepare a syllabus of the points adjudicated in each case, which shall be concurred in by a majority of the judges thereof, and it shall be prefixed to the published reports of the case.

CASES REPORTED IN THIS VOLUME

	PAGE	PAGE	PAGE
A			
Adler, Conrad v.	199	Donovan, Block v.	1
B			
Barnum v. Gorham Land Co.	359	Douglas v. City of Fargo	467
Barry v. Truax	131	Dowagiac Mfg. Co. v. Hellek-	257
Beidler & Robinson Lumber		son	516
Co. v. Coe Commission Co...	639	Dowagiac Mfg. Co. v. Mahon.	502
Bigelow, Van Dusen v.	277	Drake, Teigen v.	
Block v. Donovan	1	F	
Bosard v. City of Grand Forks	587	Farm Land Co., Purcell v....	327
Bottineau County, Braseth v...	344	Fifer v. Fifer	20
Bowden State Bank, Waldner v.	604	Fleming, Leonard v.	629
Braseth v. Bottineau County..	344	Fordham, State v.	494
Brown v. Smith	580	Fox v. Walley	610
Bruening, Reeves & Co. v....	157	G	
Burton v. Walker	149	Gearhart, State v.	663
C			
*Cairncross v. Omlie	387	Gorham Land Co., Barnum v.	359
Canfield v. Orange	622	Grand Forks Mercantile Co.,	
Carlbom, Hanson v.	361	F. A. Patrick & Co. v.	12
Carroll, State v.	383	Grand Lodge A. O. U. W.,	
Carroll v. Township of Rye...	458	Puls v.	559
Cass County, Patton v.	351	Great Northern Railway Co.,	
Cass County, Picton v.	242	Meehan v.	432
City of Devils Lake, Manning v.	47	Grondahl, Nelson v.	363
City of Fargo, Douglas v.	467	Gussner v. Hawks	453
City of Grand Forks, Bosard v.	587	H	
Clark, Signor v.	35	Halloran v. Holmes	411
Clements v. Miller	176	Hanson v. Carlbom	361
Coe Commission Company,		Hanson, King v.	85
Beidler & Robinson Lumber		Hartzell, State v.	356
Co. v.	639	Hawks, Gussner v.	453
Conrad v. Adler	199	Hayes v. Cooley	204
Cooley, Hayes v.	204	Helgebye v. Dammen	167
Cougham v. Larson	373	Hellekson, Dowagiac Mfg. Co.	
Cruikshank, State v.	337	v.	257
Cruser v. Williams	284	Hogen v. Klabo	319
Currie, State v.	655	Holmes, Halloran v.	411
D			
Dammen, Helgebye v.	167	Hougen v. Skjervheim	616
Darling v. Purcell	288	Hunnewell, McClure v.	84
Davis v. Dinnie	430	J	
Dinnie, Davis v.	430	Johnson v. Twichell	426
District Court, Fourth Judicial		Jones, Lauder v.	525
District, State v.	211	Jones, Robertson Lumber Co. v.	112
E			
F			
G			
H			
I			
J			
K			
L			
M			
N			
O			
P			
Q			
R			
S			
T			
U			
V			
W			
X			
Y			
Z			

K		PAGE	PAGE
Kaster v. Mason	107	Pewonka v. Stewart	117
Kennedy v. Stonehouse	232	Pick, National Bank of Commerce v.	74
King v. Hanson	85	Picton v. Cass County	242
Klabo, Hogen v.	319	Porter, State v.	406
L		Purcell, Darling v.	288
Larson, Cougham v.	373	Purcell v. Farm Land Co.	327
Larson, State v.	420	Puls v. Grand Lodge A. O. U. W.	559
Lauder v. Jones	525	R	
Lee, Morrison v.	591	Reeves & Co. v. Bruening	157
Leonard v. Fleming	629	Regan v. Sorenson	357
Lewis, Loomis v.	638	Robertson Lumber Co. v. Jones	112
Loomis v. Lewis	638	Russell, Timmins v.	487
Lough, Northwestern Fire & Marine Ins. Co. v.	601	S	
Lough v. White	387	Salemonson v. Thompson	182
M		Scholfield, State v.	664
McClure v. Hunnewell	84	Scott, Tracy v.	577
McLain, State v.	368	Sigfusson, Josephson v.	312
McMaster, State v.	58	Signor v. Clark	35
McQueen, Ward & Murray v.	153	Simensen v. Simensen	305
Mahon, Dowagiac Mfg. Co. v.	516	Skjervheim, Hogen v.	616
Manning v. City of Devils Lake	47	Smith, Brown v.	580
Marshall-Wells Hardware Co. v. New Era Coal Co.	396	Smith's Estate, In re	513
Mason, Kaster v.	107	Sorenson, Regan v.	357
Mattison, State v.	391	State v. Carroll	383
Meehan v. Great Northern Railway Co.	432	State v. Cruikshank	337
Miller, Clements v.	176	State v. Currie	655
Moore v. Weston	574	State v. District Court Fourth Judicial District	211
Morrison v. Lee	591	State v. Fordham	494
N		State v. Gearhart	663
National Bank of Commerce v. Pick	74	State v. Hartzell	356
Nelson v. Grondahl	363	State v. Larson	420
Nelson, State v.	122	State v. McLain	368
New Era Coal Co., Marshall-Wells Hardware Co. v.	396	State v. McMaster	58
Northern Pacific Railway Co., West v.	221	State v. Mattison	391
Northwestern Fire & Marine Ins. Co. v. Lough	601	State v. Nelson	122
O		State v. Patterson	70
Omlie, Cairncross v.	387	State v. Porter	406
Orange, Canfield v.	622	State v. Scholfield	664
Osborne - McMillan Elevator Co., Thurston v.	508	State v. Wisniewski	649
P		Stewart, Pewonka v.	117
Patrick & Co., F. A. v. Grand Forks Mercantile Co.	12	Stonehouse, Kennedy v.	232
Patterson, State v.	70	T	
Patton v. Cass County	351	Teigen v. Drake	502
		Thompson, Salemonson v.	182
		Thompson v. Travelers' Insurance Co.	444
		Thurston v. Osborne-McMillan Elevator Co.	508
		Timmins v. Russell	487
		Township of Rye, Carroll v. ..	458
		Tracy v. Scott	577
		Travelers' Insurance Co., Thompson v.	444

CASES REPORTED IN THIS VOLUME

VII

	PAGE		PAGE
Truax, Barry v.	131	Walker, Burton v.	149
Twichell, Johnson v.	426	Walley et al, Fox v.	610
V		Ward & Murray v. McQueen.	153
Van Dusen v. Bigelow	277	West v. Northern Pacific Rail- way Co.	221
W		Weston, Moore v.	574
Waldner v. Bowden State		White, Lough v.	387
Bank	604	Williams, Cruser v.	284
		Wisnewski, State v.	649
		Wrege v. Jones	267

TABLE OF DAKOTA CASES CITED IN OPINIONS.

		PAGE
Aetna Indemnity Co. v. Schroeder	12 N. D. 110	441
American Mortgage Co. v. Mouse River Live Stock Co. (N. D.)	86 N. W. 965	203
Anderson v. Bank	6 N. D. 497	628
Anderson v. Bank	5 N. D. 80	417
Ashe v. Beasley & Co.	6 N. D. 191	366, 432, 665
Bailey v. Scott	1 S. D. 337	94
Balding v. Andrus	12 N. D. 267	438, 573
Ballou v. Bergsvendson	9 N. D. 285	156
Bank v. Bank	5 N. D. 161	361
Bank v. Elevator Co.	11 N. D. 280	458
Bank v. Gilmore	3 N. D. 188	94, 432
Bank v. Kingsland	5 N. D. 263	603
Bank v. Prior	10 N. D. 146	521
Bank v. Ruettell	12 N. D. 519	521
Bateman v. Backus	4 Dak. 433	637
Baumer v. French	8 N. D. 319	361
Beach v. Beach	6 Dak. 371	309
Bennett v. Ry. Co.	2 N. D. 112	571
Bode v. Investment Co.	1 N. D. 121	477
Bolton v. Donovan	9 N. D. 575	115
Bothel v. Hoelworth	10 S. D. 491	309
Bowman v. Eppinger	1 N. D. 21	155
Boyd v. VonNeida	9 N. D. 337	515
Boyum v. Johnson	8 N. D. 306	381, 492
Brandrup v. Britten	11 N. D. 376	156
Bucholz v. Leadbetter	11 N. D. 473	492
Cameron v. Ry. Co.	8 N. D. 124	443, 444
Capital Bank of St. Paul v. School District No. 53	1 N. D. 479	614
Carruth v. Taylor	8 N. D. 166	578
Cass County v. Bank	9 N. D. 265	256
Cass County v. Improvement Co.	7 N. D. 528	297, 298
Colby v. McDermont	6 N. D. 495	155
Commercial National Bank v. Smith.....	1 S. D. 28	579
Darling v. Purcell	13 N. D. 288	288
Davis v. Dinnie	13 N. D. 430	666
Dinnie v. Johnson	8 N. D. 153	166
Douglas v. Richards	10 N. D. 366	190
Dows v. Glaspel	4 N. D. 251	646
Dunham v. Peterson	5 N. D. 414	82
Easton v. Lockhart (N. D.)	89 N. W. 75	46
Eaton v. Bennett	10 N. D. 346	478
Eldridge v. Knight	11 N. D. 552	80
Emmons County v. Bank	9 N. D. 583	298, 299, 332, 333
Emmons County v. Bennett	9 N. D. 131	352
Emmons County v. Thompson	9 N. D. 598	287, 332, 335
Engstad v. Dinnie	8 N. D. 1	614
Fargusson v. Talcott	7 N. D. 183	381, 492
Farwell v. Richardson	10 N. D. 34	515

		PAGE
Farrington v. New England Investment Co...	1 N. D. 102	476
Field v. Elevator Co.	5 N. D. 400	387
First National Bank v. Flath	10 N. D. 281	83
First National Bank of Fargo v. Red River Valley National Bank of Fargo	9 N. D. 319	155
Fletcher v. Church	11 S. D. 537	116
Flugel v. Henshel	7 N. D. 276	419
Forman v. Healy	11 N. D. 563	85, 152
Foster v. Furlong	8 N. D. 282	379
Frost v. Flick	1 Dak. 131	477
Gaines v. White	1 S. D. 434	317
Galbraith v. Paine	12 N. D. 164	203, 333, 335
Garr, Scott & Co. v. Spalding	2 N. D. 414	350
Grand Forks Lumber Co. v. Tourtelot	7 N. D. 587	521
Hestetter v. Elevator Co.	4 N. D. 357	361
Hutchinson v. Cleary	3 N. D. 270	521
Huntermer v. Arent (S. D.)	93 N. W. 653	156
In re Eaton	7 N. D. 269	578
In re Kaepler	7 N. D. 307	46
In re Weber	4 N. D. 119	387
James v. Wilson	8 N. D. 186	28
Jasper v. Hazen	4 N. D. 1	265, 602
Johns v. Ruff	12 N. D. 74	231
Kicks v. Bank	12 N. D. 576	381
King v. Hanson (N. D.)	99 N. W. 1085	432
Kirby v. Jameson	8 N. D. 8	81
Kohn v. Lapham (S. D.)	82 N. W. 408	637
Kola v. Jones	6 N. D. 461	327
Kuhnert v. Conrad	6 N. D. 215	172
Kulberg v. Georgia	10 N. D. 463	112
Little v. Braun	11 N. D. 410	603
McClure v. Hunnewell	13 N. D. 84	152
McComb v. Lake County (S. D.)	70 N. W. 652	480
McGnin v. Lee	10 N. D. 160	603
McHenry v. Kidder County	8 N. D. 418	251
McKenzie v. Water Company	6 N. D. 371	79
McLaughlin v. Wheeler (S. D.)	47 N. W. 816	156
McMillan v. Conat	11 N. D. 256	432, 666
Mahon v. Leech	11 N. D. 181	620
Marshall v. Andrew & Gage	8 N. D. 364	28
Mass. Loan & Trust Co. v. Twichell	7 N. D. 440	83
Merrill v. Hurley	6 S. D. 601	81
Mettel v. Gales	12 S. D. 632	379
Minnesota Thresher Co. v. Schaack	11 S. D. 511	193
Minnesota Thresher Mfg. Co. v. McDonald..	10 N. D. 408	166
Mooney v. Williams	9 N. D. 329	82
Murray v. Burris	6 Dak. 170	25
Myrick v. Bill (Dak.)	37 N. W. 369	171
Myrick v. McCabe	5 N. D. 422	578
Nichols & Shepard Co. v. Stangler	7 N. D. 102	361
Nichols v. Tingstad.....	10 N. D. 172	584
North Star Boot & Shoe Co. v. Stebbins ..	3 S. D. 540	417
Oliver v. Wilson	8 N. D. 590	94
Olson v. O'Connor	9 N. D. 504	512
Omlie v. Bank	8 N. D. 570	512
O'Neil v. Tyler	3 N. D. 47	477, 484
Paulson v. Ward	4 N. D. 100	195
Peckham v. Van Bergen	8 N. D. 595	362
Pederson v. Dibble	12 N. D. 572	11

TABLE OF DAKOTA CASES CITED IN OPINIONS

XI

		PAGE
Hickon v. Cass County (N. D.)	102 N. W.	174 638
Hickon v. City of Fargo	10 N. D.	469 478
Hier v. Lee	14 S. D.	608 382, 492
Plano Mfg. Co. v. Root	3 N. D.	165 521
Porter v. Andrus	10 N. D.	562 83
Power v. Bowdle	3 N. D.	107 64
Power v. Larabee	2 N. D.	141 476
Prondziniski v. Garbutt	9 N. D.	239 350, 387
Railroad Co. v. McGinnis	4 N. D.	494 478
Randall v. Burk Township	4 S. D.	337 265
Red River Valley National Bank v. Barnes	8 N. D.	432 18
Richmire v. Elevator Co.	11 N. D.	453 441
Riley v. Riley	9 N. D.	580 602
Roberts v. City of Fargo	10 N. D.	230 614
Roberts v. Roberts	10 N. D.	531 172
Roblin v. Palmer	9 S. D.	36 637
Roby v. Bismarck National Bank	4 N. D.	156 171
Rolette County v. Pierce County	8 N. D.	615 46
Roller Mill v. Ward	6 N. D.	317 195
Ross v. Page	11 N. D.	458 492
Russell v. Whitcomb	14 S. D.	426 115
Scott v. Clark	3 S. D.	486 156
Schmitz v. Heger	5 N. D.	165 361
Schneller v. Plankinton	12 N. D.	561 203, 331, 335
Shattuck v. Smith	6 N. D.	56 299
Shelley v. Mikkelsen	5 N. D.	22 7
Shepard v. Hanson	10 N. D.	194 122
Stanford v. McGill	6 N. D.	536 166
State v. Albright	11 N. D.	22 47
State v. Barry	11 N. D.	428 135
State v. Collins	10 N. D.	464 357
State v. Cruikshank	13 N. D.	337 392
State v. Davis	2 N. D.	461 578
State v. Davis (S. D.)	75 N. W.	897 615
State v. Dellaire	4 N. D.	314 125
State v. Fordham	13 N. D.	494 652
State v. Getchell	3 N. D.	243 614
State v. Haynes	7 N. D.	356 267
State v. Johnson	3 N. D.	150 342
State v. Kent	5 N. D.	541 326, 558
State v. Liudahl	11 N. D.	320 422
State v. McGahey	12 N. D.	535 73, 371
State v. McGruer	9 N. D.	572 127
State v. McMaster	13 N. D.	58 127
State v. Marcks	3 N. D.	532 343, 395
Storey v. Murphy	9 N. D.	115 614, 616
State v. Rozum	8 N. D.	558 125, 499, 652
State v. Scholfield (N. D.)	102 N. W.	878 664
State v. Smith	2 N. D.	515 614, 616
State v. Taylor	7 S. D.	533 655
State v. Thoenke	11 N. D.	386 126, 652
State v. Wisniewski	13 N. D.	649 662
Stewart v. Gilruth	8 S. D.	181 283
Stevens v. Casualty Co.	12 N. D.	463 568
Stierlen v. Stierlen	8 N. D.	297 78, 80
Stutsman County v. Mansfield	5 Dak.	78 608
Sweet v. Meyers	3 S. D.	329 187
Sykes v. Beck	12 N. D.	242 297
Territory v. Cavanaugh	3 Dak.	325 220

		PAGE
Tetrault v. O'Connor	8 N. D. 15	155
Timmins v. Russell (N. D.)	99 N. W. 48	382
Tribune Co. v. Barnes	7 N. D. 591	432
Tyler v. Shea	4 N. D. 377	46
Vermont Loan & Trust Co. v. Whithed	2 N. D. 82	254
Vickery v. Burton	6 N. D. 252	82
Wadge v. Kittleson	12 N. D. 452	620
Way v. Johnson	3 N. D. 150	342
Wells County v. McHenry	7 N. D. 246	299
Wells v. Geyer	12 N. D. 316	603
Wendt v. Railway Co.	4 S. D. 476	323, 327
Wheeler v. Castor	11 N. D. 347	349
Whitbeck v. Lees	10 S. D. 417	608
Whitte v. Reilly	11 N. D. 203	166
Wilson v. Elevator Co.	12 N. D. 402	80
Winona Lumber Co. v. Church	6 S. D. 498	180
Wishek v. Becker	10 N. D. 63	221
Wrege v. Jones	13 N. D. 267	551
Yorke v. Yorke	3 N. D. 343	309

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
NORTH DAKOTA

EZRA BLOCK v. E. I. DONOVAN.

Opinion filed July 1, 1903.

Specific Performance — Equitable Relief.

1. In an action for specific performance, wherein plaintiff prays for general equitable relief in case specific performance cannot be had, and where it appears that defendant has obtained a transfer of title to plaintiff's land under a contract by which the consideration for the deed was to be delivered to plaintiff contemporaneously with the delivery of the deed to him, but where defendant, upon transfer of title, failed, neglected and refused to turn over to plaintiff the notes, mortgages and papers for which the deed was made, but, while holding the fruits of his bargain, refuses to comply with his part of it for such time and until the real inducement for plaintiff's entering into the agreement has failed, so that the turning over of the agreed consideration for the deed will not execute the purpose of the parties when the contract was made, in this sense specific performance cannot be made. It is within the power of the court to decree a redeeding of the real property to plaintiff, or to decree a cancellation of the deed to defendant, or both.

An Order Is Presumed to be Based on Competent Evidence.

2. The district court ordered specific performance of the contract to be made within thirty days, and if not made within that time, that the deed be canceled. At the end of thirty days the contract and deed were ordered canceled. In the absence of proof that specific performance was made, except the recitals of the order, it will be presumed in this court that the order was based on competent evidence.

Appeal from District Court, Cavalier county; *Kneeshaw, J.*
Action by Ezra Block against E. I. Donovan. Judgment for
plaintiff and defendant appeals.

Affirmed.

Gordon & Lamb, for appellant.

A clear and explicit written instrument supersedes all contemporaneous oral negotiations concerning the subject to which the same relates, and parol evidence is inadmissible. *Strunk v. Smith, et al.*, 66 N. W. 926; *Northwestern Fuel Co. v. Bruns*, 1 N. D. 137, 45 N. W. 699; *Western Twine Co. v. Wright et al.*, 78 N. W. 943; *Wm. Deering & Co. v. R. R. Russel et al.*, 5 N. D. 319, 65 N. W. 691; *Knudson et al. v. Grand Council of Northwestern Legion of Honor et al.*, 63 N. W. 911; *Plano Manfg. Co. v. Root*, 3 N. D. 165, 54 N. W. 924.

So with contracts executed by the acceptance of a contract tendered by the other party, by whom alone it is signed. 7 Am. & Eng. Enc. of Law (2d Ed.) 112, 122.

An instrument recorded without proper acknowledgment is not notice to a stranger, notwithstanding he may be aware of its existence from other sources. *Main v. Alexander*, 9 Ark. 112, 47 Am. Dec. 732; *Hannah v. Carrington*, 18 Ark. 105; *Jacoway v. Gault*, 20 Ark. 190, 73 Am. Dec. 494; *Haski v. Sevier*, 25 Ark. 152.

So with chattel mortgages required to be acknowledged. *Forrest v. Tinkham*, 29 Ill. 141; *Porter v. Dement*, 35 Ill. 478.

Dickson & Dickson, for respondent.

Plaintiff has pursued the correct remedy. Sections 5024 and 5025, Rev. Codes 1899. The action brought by the vendor against the vendee to recover purchase price is in the nature of specific performance. *Shelly v. Mikkelson*, 5 N. D. 22, 63 N. W. 210; *Pom. on Cont.* 6.

By accepting the title to the land and assuming the obligation to pay, cancel and return plaintiff's evidence of indebtedness, the defendant became a trustee and the plaintiff's remedy was by an action for specific performance to enforce the terms of the trust. 22 Am. & Eng. Enc. (1st Ed.) 998; *Buck v. Swazy*, 35 Me. 41, 56 Am. Dec. 681; *Boyd v. Soule*, 8 Gray, 554; *Woodruff v. Railroad Co.*, 93 N. Y. 609, 16 Am. & Eng. R. R. Cases, 501.

Contracts for the delivery, execution, assignment or cancellation of promissory notes, for the transfer of debts and claims, may be enforceable specifically. 22 Am. & Eng. Enc. of Law (1st Ed.) 1000; *Golscelk v. Stein*, 69 Md. 51; *Stokley v. Davis*, 17 Ga. 177, 63 Am. Dec. 233; *Tuttle v. Moore*, 16 Minn. 123; *Clark v. White*, 12 Pet. 178, 9 L. Ed. 176; *Henderson v. Johns*, 13 Colo. 280, 22 Pac. 461.

It will be presumed that complete evidence was before the court upon all material points upon which a judgment is based. *Cole v. Custer County Agricultural, Mineral & Stock Ass'n*, 52 N. W. 1086; *Reinig v. Hecht*, 16 N. W. 548.

MORGAN, J. This is an action brought for the specific performance of a contract, or for a cancellation of the contract if specific performance shall fail. The facts out of which the action arose are as follows: On February 19, 1901, the plaintiff and his wife conveyed to the defendant their homestead. The price agreed on for the land was \$1,500. There were mortgages and liens and taxes due and to become due against this land aggregating \$1,597.95. The evidence of the two parties to the sale is conflicting as to how this price of \$1,500 was to be paid. The plaintiff testifies that the defendant was to pay some of his outstanding debts so far as due, and return him the notes. These debts amounted in all to the said sum of \$1,597.95. This sum included a note to Allert & Winter for \$99.75, and plaintiff testifies that this note and a mortgage securing a part of said sum were to be paid by defendant and returned to him. The plaintiff further testifies that he was to pay to the defendant the sum of \$97.95, being the excess of the total indebtedness over the \$1,500, the price of the land, as agreed on. The Citizens' Bank of Langdon held a note secured by a mortgage on this land and a chattel mortgage for \$220, and one McPhail had a note and mortgage against him. These two notes were to be paid by the defendant, and such payment credited as part of the price of the land. After the deed was delivered to the defendant, he refused to pay the Allert & Winter note and mortgage, claiming that he had not agreed to do so unless compelled to do so as a matter of law; and that he could not be compelled to pay it, as this mortgage was not a lien on the land as to subsequent purchasers. His claim was that this mortgage was not acknowledged properly, and therefore was not a valid mortgage

so far as his deed was concerned, as its record was not notice to him. Upon the failure of the defendant to pay this note, partly secured by mortgage, plaintiff paid it himself by some arrangement with Allert & Winter, and tendered the note and mortgage, duly satisfied, to the defendant, and demanded a compliance with his contract to return the other notes as agreed on. The defendant refused to turn over the notes unless he was paid \$97.95 in cash. Defendant's contention is that the payment to him of the sum of \$97.95 in money was a condition precedent to the turning over of these notes to the plaintiff, and, said sum not having been paid to him at all, no duty on his part has arisen to turn them over. Plaintiff testifies that no time was ever specified during which he was to pay the \$97.95; that the Allert & Winter mortgage was to be immediately turned over to him the same as the bank and McPhail notes and all the others, except the \$800 mortgage on the land, which was not yet due. The object of the plaintiff in selling the land on such terms was to secure a release of the bank mortgage and of the McPhail mortgage and the two mortgages on his personal property. He desired the release of this personal property from these mortgages so that he could raise money to pay other debts and obligations by mortgaging the property again. As corroborating his contention that he was not to deliver these notes and mortgages to plaintiff until he was paid the \$97.95, the defendant relies on the following writing, known in the record as "Exhibit 1," viz.: "On payment to me of ninety-seven dollars and ninety-five cents by Ezra Block for a deed to me to southeast quarter section 8, township 161, range 60, given by Ezra and Nellie Block for one dollar, I agree to return to said Block a note for \$220 to the Citizens' State Bank, a note of \$164 to J. McPhail, a note of \$100 to Mahon & Robinson and a note of \$15 to Mahon & Robinson, and a note to Liebler & Timerty for \$85; excepting costs incurred. [Signed] E. I. Donovan." What was said and done when the above memorandum was drawn and given to the plaintiff is a matter of dispute between the parties. The plaintiff says it was not given him until after the deed was signed by him, and after the terms of the agreement had been fully settled. He says that he told the defendant that he wanted a guaranty from him that he would settle the notes, and in response to such request he received Exhibit 1; that he did not

read it at the time, and did not observe that it omitted mention of the Allert & Winter note; that he endeavored to have it corrected before his wife signed the deed, but failed to reach home in time. The defendant says that this writing expresses the agreement as entered into by them, and that it was thoroughly and carefully examined by plaintiff before he signed the deed.

From the testimony of these two parties we are called upon to decide what agreement the parties entered into when the deed was executed. If effect is to be given to Exhibit 1, then the payment of \$97.95 was a condition precedent to the return of the notes mentioned. But we are forced to the conclusion that Exhibit 1 was no part of the agreement as entered into by the parties. The deed had been signed by plaintiff and delivered to Donovan before this writing was called for and drawn. True, the deed had not been acknowledged by plaintiff or his wife, but all the details of the transaction had been fully agreed upon. But the deed had been acknowledged by plaintiff before he discovered that Exhibit 1 did not correctly recite what the agreement was. By this writing it was attempted to incorporate into the contract matters that had not been mentioned in the conversation which culminated in the signing of the deed, and matters that were directly opposed to the terms of the contract as agreed upon before. The matter of costs, the omission of the Allert & Winter mortgage from the agreement, and that the \$97.95 was to be paid as a condition precedent, were not in accordance with the previous conversations. Great stress is laid upon the fact that Exhibit 1 was taken and kept by Block, and that he thereby acquiesced in its terms. It was accepted by him believing that it contained a memorandum that Donovan was to pay these debts, and return the evidence thereof to him. As soon as he discovered that it did not correctly recite the agreement, he endeavored, without success, to have it corrected. The consideration for the deed was that plaintiff was to clear up his indebtedness to the extent named. He was selling his land without receiving any cash therefor, and for no other consideration save that of wiping out that much of his indebtedness and clearing his personal property of the chattel mortgages thereon. The defendant admits that the Allert & Winter note and mortgage was included in the total indebtedness of \$1,597.95, and was considered by the plaintiff as a valid lien on the land, but was not so considered by

himself. By leaving this mortgage out of Exhibit 1, he wished to be allowed to test the validity of the mortgage, and at the same time compel Block to pay the amount of it in cash to him before the agreement became binding at all. This was not the agreement. Exhibit 1 never became effective as a part of their contract. Block never consented to it, and Donovan was promptly advised that it was not in accordance with the agreement, and he was not in any way injured or prejudiced by its retention by Block. It is plain from the evidence that Block never acquiesced in the terms of Exhibit 1. By it he must raise \$97.95 before his property was cleared of chattel mortgages. He had no way of doing so if these mortgages were not satisfied. His personal property was all mortgaged, and foreclosures were about to be begun. If defendant's contention be true, the plaintiff deceded his land without benefiting himself at all so far as saving his personal property was concerned, or in any other way. That he should do so seems so improbable that we cannot accept it as a fact. Exhibit 1 was not a part of the agreement as entered into, and no further consideration is given to it.

On the day following the delivery of the deed, the personal property mortgaged to secure the Citizens' State Bank and McPhail notes was taken under the mortgages for foreclosure purposes. It fairly appears that this was done with the knowledge of the defendant, who made no effort to prevent it by paying the notes, as agreed to by him. Fifty dollars and seventy cents costs were incurred in taking the property under these mortgages. It is claimed by defendant that these costs were to be added to the \$97.95 and the total sum to be paid by Block before the notes were to be turned over to him. This is denied by Block. There was no agreement as to costs when the contract was made and the deed signed. We think that the evidence shows that the payment of these costs by Block was not a condition precedent to the delivery of the notes to Block, and shows that the \$97.95 was not to be paid before the delivery of the notes, and for the same reasons. If any costs had been made when the deed was delivered they were only nominal. Had Donovan performed his agreement promptly, no more costs would have been made. The question of fact involved in the appeal is therefore resolved in favor of the plaintiff. His right to have surrendered to him the notes and other evidences of the liens on this

land to secure his debts accrued at once on the delivery of the deed by him. Defendant refused to comply with this duty entirely. He has delivered none of the notes to plaintiff, and has only paid a small portion of the indebtedness. He is therefore in default, and has not performed the agreement. The right to compel him to perform in this form of action is not disputed. *Shelley v. Mikkelson*, 5 N. D. 22, 63 N. W. 210. His refusal was based not on a question of law, but on a question of fact. The plaintiff has performed every act to entitle him to a specific performance of the contract, and the defendant is in default on every act required of him to be done. Through defendant's fault the consideration of the contract has wholly failed; that is, he has done nothing to perform his part of the agreement. Such total failure of the consideration on his part would have entitled plaintiff to rescind the contract under section 3932, Rev. Codes 1899. The plaintiff prayed for a cancellation of the contract in his complaint if relief by specific performance became unavailable. It was granted by the district court unconditionally, after making findings of fact and conclusions of law that the deed would be canceled unless defendant specifically performed his contract within thirty days after service of such findings upon him. He refused to comply with his contract during the thirty days, and a judgment of cancellation was entered.

If it be conceded that a judgment for a specific performance of the contract could be properly entered in this case as to these notes or liens not already paid by defendant, still the plaintiff would not be necessarily limited to such relief. If relief by ordering specific performance would be impracticable, inadequate, or would not place the parties approximately in the same situations as if the contract had been performed, the court had the power to decree other relief within the issues made by the pleadings, if the facts warranted it. *Bennett v. Abrams*, 41 Barb. (N. Y.) 619. The decree that defendant specifically perform his contract might be ineffectual so far as restoring the plaintiff to such rights as the contract would have entitled him to is concerned. This was doubtless the ground on which the district court decreed a cancellation of the deed. It is strenuously urged that such decree is oppressive so far as defendant is concerned, and will cause him irreparable hardship, and he asks now to be allowed to specifically carry out the contract, if

found to be in default. We do not understand that the decree goes further than to cancel the deed. As to other matters, it leaves both of them practically in the same positions they were in when the contract was made. The defendant owns the bank and McPhail notes, which are amply secured on the land. We think this is a more equitable decree than would be one allowing him to now come in and specifically perform his contract. For over two years he has resisted compliance with his contract by resorting to harsh measures, so far as the plaintiff is concerned. He secured possession of the two notes mentioned under the contract, but in the place of offering them on conditions to plaintiff he commenced suit under them by taking the plaintiff's property for foreclosure purposes. His attitude has been to insist on payment of the \$97.95 even after plaintiff had settled the Allert & Winter indebtedness. Under the contract he was to pay this \$97.95 representing the Allert & Winter indebtedness. The plaintiff having paid this, it would seem unreasonable that he should refuse to carry out his contract because he desired to test the validity of the acknowledgment of that mortgage as notice when recorded. The power of the court to grant the decree of cancellation is not disputed in this case, and it does not appear that the decree works any greater hardship to the defendant than would follow to the plaintiff by allowing defendant to perform the contract now.

In the order for judgment of February 24, 1902, the district court ordered the defendant to pay off all the indebtedness of the plaintiff included in the contract of February 19, 1901, except the \$800 mortgage and the Allert & Winter mortgage, and to turn back to the plaintiff all the notes given for such indebtedness, within thirty days after the service on him of a copy of the findings. The district court further made an order that, in the event of defendant's failure to pay off and discharge said indebtedness and to return said notes to the plaintiff within said thirty days; the plaintiff should be entitled to a cancellation of said deed of February 19, 1901, and a decree declaring him entitled to said land and the possession thereof. On the 3d day of May, and after the expiration of said thirty days, the district court ordered judgment to be entered canceling said deed, and declaring the plaintiff to be the owner and entitled to the possession of said premises. This order contained the following preliminary recital of facts: "And having

made his findings of facts and conclusions of law in accordance therewith, and the same having been filed in the office of the clerk of the court, and a copy thereof having been duly served upon the defendant personally, and the same having required said defendant to perform the conditions of the contract expressed therein within thirty days from the date of the said service, and more than thirty days having elapsed since the date of said service, and the defendant having failed, neglected and refused to perform the conditions of said contract by his failure, neglect and refusal to discharge the indebtedness of the plaintiff and to return the notes evidencing same, as set forth and required by the provisions of said findings." It is claimed by the appellant that the judgment should be reversed for the reason that there was no showing made that the defendant had failed to comply with this order. The record does not show affirmatively what evidence, if any, was taken on this question. The recital in the order is specific that there was a failure to comply with the previous order attached to the findings. There is no rule of court or statute stating how proof of such defaults shall be made, nor what such proofs shall be. There is no claim made that there was a compliance with such order. The district court is one of general jurisdiction, and had jurisdiction of defendant's person and of the subject matter of the action. There is a presumption in favor of its orders in such matters. In view of the recital in the order, it will be presumed that the order was based on proper evidence. Such orders are not necessarily made in term time, and no provision is made for the filing or preservation of proof in such matters. Hayne on New Trial and Appeal lays down the rule as follows: "If the record does not show what the action of the court was, or upon what it was based, and all the material circumstances in regard to it, it will be presumed to have been regular and correct. There must, therefore, be a record on appeal to make these facts appear to the Supreme Court; and in accordance with the presumption above stated the burden of preparing it is cast upon the appellant." Section 285, *supra*. See, also, *Mannig v. McClurg*, 14 Wis. 379; *Mitchell v. Rolison*, 52 Wis. 155, 8 N. W. 886. It does not, therefore, appear that the judgment was entered without evidence to support it, so far as this alleged default is concerned.

The judgment is affirmed. All concur.

ON REHEARING.

(April 11, 1904.)

On the reargument appellant contends that an action for specific performance is not the proper remedy under the facts of this case. His argument proceeds upon the theory that plaintiff's action should have been an action for the purchase price unpaid; that plaintiff deeded the land to defendant and accepted his promise to pay certain indebtedness of plaintiff's and, having relied on such promise, the consideration for the deed was such promise, and that the consideration for the deed has not failed. This position is not in accordance with the facts. The plaintiff did not convey the land relying upon defendant's promise that he would satisfy these outstanding claims some time in the future. The payment of these claims and the turning over of the securities duly satisfied were to be simultaneous as to time with the delivery of the deed. The complaint is not framed on the theory of an action for the purchase price. It is not the purchase price that the plaintiff seeks to recover. The prayer of the complaint is that "defendant be compelled to specifically perform said agreement, and to pay off and return to the plaintiff the said notes and indebtedness hereinbefore described, or in the alternative, for a redelivery and cancellation of said deed." The allegation of the complaint as to the agreement is that defendant was to pay off and return to the plaintiff certain described promissory notes. The action therefore is for the performance of a special contract according to its terms. It does not seek the payment of the money to plaintiff. It asks for more than the payment of money, and asks for the turning over of specific securities and evidences of debt. The relief asked is beyond that which could be awarded in an action at law. The action is not, therefore, one wherein a judgment at law could fully secure the relief asked for. Pomeroy on Spec. Perf., section 6, lays down the rule as follows: "While it is true that in these suits by the vendor there is generally some other act to be done by the purchaser besides the simple payment of money, the performance of which may be enforced by the decree, even in those cases where no such act has been undertaken by him in the contract, he may be compelled to accept the deed or assignment or other subject-matter, as well as to pay the price, so that the decree is not purely one for the re-

covery of money." In the case at bar the duty of paying the outstanding notes and procuring satisfaction of the securities and surrendering them to plaintiff devolved on defendant, and the action is brought to compel him to do so. It is true these acts call for the payment by him of money, but not to the plaintiff; and it is not true that a money judgment for the agreed price of the land would secure the plaintiff the benefit of his contract. *Johnson v. Wadsworth* (Or.) 34 Pac. 13. That the facts do not warrant an action for a specific performance was not raised in the trial court, nor in this court until the reargument; but we are satisfied the action is proper under the facts found, and that the action is not one where the relief sought is alone that of securing judgment for the price of the land. The contract is not one wholly executed. Plaintiff has fully executed his part of it, but the defendant has not complied with what he was to do under the terms of the contract. If plaintiff had not delivered the deed, and defendant had paid the notes and satisfied the mortgages and made a tender of them to plaintiff duly paid, no doubt would exist but that defendant could compel the plaintiff to execute and deliver the deed. The contract created mutual obligations, and the remedies thereunder are also mutual. *Pomeroy on Spec. Perf.*, section 165; *Pederson v. Dibble*, 12 N. D. 572, 98 N. W. 411.

It is further urged that defendant should now be allowed by this court to specifically perform the contract, and that the decree canceling the deed was entered without due regard to the defendant's rights. That the procedure was irregular is true. The order of February 24th was not in accordance with the practice in specific performance actions. Vol. 20, Enc. Pl. & Pr. p. 504. The decree finally entered unconditionally canceled the deed. The prayer of the complaint asked for such cancellation if specific performance was found to be unavailing. The object of a suit for specific performance is to secure a decree placing the parties in the same position as they would have been in had the contract been promptly performed. If, by the action of the parties, or for other causes, the parties cannot be placed in such position, specific performance will not be decreed; but the court will adjust the equities of the case between the parties so as to do justice as near as possible to each. *Worrall v. Munn*, 38 N. Y. 137; *King v. Morford*, 1 N. J. Eq. 274. A decree of specific performance now will not give the plaintiff the benefits he was justly entitled to under the

contract. The defendant has persisted in refusing to comply with the contract when within his power, and has repudiated it entirely, although retaining the deed without any compliance with his contract. The order of February 24th required the defendant to pay the notes and turn them over to plaintiff within thirty days. The defendant refused to do so. That order gave him notice that, unless he did pay such notes, and turn them over, the deed would be canceled in accordance with the prayer of the complaint. He allowed the decree of cancellation to be entered against him. His appeal therefrom has not stayed the issuing of execution. He gave no bond to stay execution under section 5611, Rev. Codes 1899. If the defendant had deposited the notes, duly paid, in court, upon the making of the order of February 24th, to be turned over to plaintiff if, on appeal, it should be found that his contention as to the contract was erroneous, this court might order the decree modified, so as to permit him to now perform his contract. As the facts now exist, we see no equitable reasons for so doing. As stated before, the decree of the district court does justice between the parties as nearly as could be done by any other decree, and more so than would be done by now allowing defendant to do what he should have done nearly three years ago. As it was within the legitimate exercise of the equitable power of the district court to order the cancellation of the deed under the facts as proven and the prayer of the complaint, and as such judgment adjusts the rights of the parties in an equitable manner, we find no sound reasons for interfering with the judgment. *Papin v. Goodrich*, 103 Ill. 86; *Ferry v. Clarke*, 77 Va. 407.

Payments made by defendant under the contract will stand as obligations against the plaintiff of the same character as when the contract was made.

The judgment is affirmed. All concur.
(99 N. W. 72.)

F. A. PATRICK & COMPANY, A CORPORATION, v. GRAND FORKS
MERCANTILE COMPANY, A CORPORATION.

Opinion filed November 30, 1903.

Undisclosed Principal Liable for Agent's Purchases.

1. Where goods are purchased by an agent without disclosing his agency or the name of his principal, the latter may be held liable for the debt, when discovered.

Same — Sufficiency of Complaint.

2. The mortgagee of a stock of general merchandise entered into a contract with the mortgagor for the continuation of the business, and embodied the same in his chattel mortgage. Under the terms of the contract, the business was to be conducted by the mortgagor as the agent of the mortgagee, and under the contract he had authority, and it was his duty, to make purchases of goods to replenish the stock. The plaintiff sold and delivered goods to the mortgagor without knowledge of the existence of this contract. It is *held*, in an action to recover the purchase price of the goods so sold from the defendant mortgagee, as an undisclosed principal, that the trial court erred in granting defendant's motion to dismiss the case upon the ground that the complaint does not state facts sufficient to constitute a cause of action.

Appeal from District Court, Grand Forks county; *Fisk, J.*

Action by F. A. Patrick & Co. against the Grand Forks Mercantile Company. Judgment for defendant and plaintiff appeals.

Reversed.

Templeton & Rex, for appellant.

The contract in question was carefully drawn, so that it would not be subject to attack under *Red River Valley Nat. Bank v. Barnes*, 8 N. D. 432, 79 N. W. 880, and *Bergman v. Jones*, 10 N. D. 520, 88 N. W. 288. The case at bar is analogous to *Hubbard v. Tenbrook*, 124 Pa. St. 291, 10 Am. St. Rep. 585, 16 Atl. 817.

It matters not that the instrument partakes of the nature of a chattel mortgage, if the relation of principal and agent was created, and was in existence when the goods were bought. The mortgagor was placed and continued in charge of the business and clothed with power to purchase goods. See *Lamb v. Thompson*, 48 N. W. 58; *Henderson v. Mayhew*, 41 Am. Dec. 434; *Mechem on Agency*, 695; *Story on Agency*, sections 446-449.

C. J. Murphy, for respondents.

The instrument set forth in the complaint is a chattel mortgage. It transferred no interest other than a lien. The mortgagor was the agent of the mortgagee only to keep track of the security and account for the proceeds, less proper expenditures. *Red River Valley National Bank v. Barnes*, 8 N. D. 441, 79 N. W. 880.

The mortgagor was at all times the real owner. The lien and interest of the mortgagee were wholly incident to and dependent

upon mortgagor's absolute ownership. There could be no secret or undisclosed agency where the known party was acting in his own business. Giving a mortgage on his property made the mortgagor none the less the owner and principal in his business. Such a rule destroys the entire value of chattel security. A mortgagor has a right to handle and use the mortgaged property so as to redound to the interest of his creditor and himself. The rule, that an undisclosed principal, when found, is liable for his agent's indebtedness, can only be applied where there is a real undisclosed principal. Where the proprietary interest in the business is in him who is carrying it on, he cannot be considered an agent, so far as acts performed in the care and management of the business are concerned. He cannot be both owner and agent.

YOUNG, C. J. The plaintiff sues the defendant, as an undisclosed principal, to recover the purchase price of certain goods sold and delivered to one Goertz, its alleged agent. When the case came on for trial, and before any evidence was offered, the defendant moved for judgment upon the ground that the complaint fails to state facts sufficient to constitute a cause of action. The motion was granted, and judgment was entered dismissing the action, with prejudice, and for costs. Plaintiff has appealed from the judgment, and assigns the order sustaining the above motion as error.

But a single question is presented for determination upon this appeal, and that is, whether the complaint states a cause of action. We are of opinion that it does, and that the motion for judgment should not have been granted. The complaint alleges, in substance, that on and prior to April 22, 1902, one J. H. Goertz was engaged in the general mercantile business at Rosehill, in Cavalier county; that on said date he entered into a written contract with the defendant, a copy of which is attached to and made a part of the complaint, whereby, as plaintiff contends, he transferred to the defendant the possession of his entire stock of general merchandise, and also the exclusive control, direction and supervision of said business, and became the defendant's agent in managing and conducting the same; that he continued in that capacity until about March 1, 1903, when another person was placed in charge; that during the time when Goertz was managing said business for the defendant, to wit, between August 18, 1902, and October 3, 1902, the plaintiff, at the special instance and request of said Goertz, sold and delivered to him goods, wares and merchandise of the reason-

able value of \$749.52, which said sum the said Goertz promised and agreed to pay on the 1st day of November, 1902; that the said goods were sold and delivered to said Goertz, to be used by him in connection with and as a part of the stock of merchandise hereinbefore referred to; that the plaintiff did not ascertain that Goertz had been acting as agent for the defendant in the premises, nor did it learn of the existence of the contract in question until shortly prior to the commencement of this action; that upon ascertaining such facts the plaintiff duly elected to hold the defendant for the goods so sold and delivered to its said agent, and duly notified the defendant of such fact, and demanded payment; that no part of the said sum has been paid. The instrument above referred to, which plaintiff exhibits as a part of its complaint, and which it contends establishes the relation of principal and agent between the defendant and Goertz for the purchase of the goods, contains a chattel mortgage to defendant upon the stock of merchandise, and in addition a contract for the continuation of the business, its management, and the disposition of the proceeds of sales. The first half of the instrument is in form and substance an ordinary chattel mortgage, whereby Goertz mortgages to the defendant his entire stock of general merchandise, with additions, to secure the payment of a debt of \$1,160.94, with authority to defendant to "sell the same as provided by law for the sale of mortgaged property" in case of default in payment, or when it deems itself unsafe or insecure. It is agreed that this portion of the instrument merely creates a lien upon the property, and establishes no other legal relation between Goertz and the defendant than that of mortgagor and mortgagee. The controversy is as to the effect of the remaining part of the instrument, which is as follows: "It is further understood and agreed that so long as the terms and conditions of this mortgage are kept and performed by the undersigned, the undersigned may retain possession of said property and conduct his business at the place aforesaid and sell and dispose of his said stock in trade and accumulations thereof in the ordinary course of trade for cash and credit, such credit sales, however, in no event to extend beyond the period of thirty days, this provision being for the purpose of allowing the undersigned to extend credit through each current month's business only, prompt collections of all accounts so extended to be made at the end of each and every month; provided, however, that such possession and control shall be un-

der the direction, supervision and control of the said Grand Forks Mercantile Company or such person as it may designate therefor in case said mortgagee shall at any time after the execution of this mortgage decide to take the possession and control of said business from the undersigned. It being expressly understood and agreed that the possession, control and management of the undersigned shall be considered the possession and control of the said mortgagee and the said undersigned during the continuance of this mortgage shall be considered as the agent of the said mortgagee. And the undersigned agrees to keep a strict, accurate and detailed account of all sales of said property made by him as aforesaid and of all cash and monies realized therefrom and accounts and notes contracted and received by him. The undersigned also agrees to keep a strict account of all expenses incurred in the conduct of said business, including reasonable compensation to him and all expenditures necessary and proper for the purpose of replenishing and keeping up said stock, the said undersigned being hereby authorized and required to keep up and replenish his said stock in trade so that the business shall be conducted profitably to both said mortgagor and said mortgagee; that such accounts so kept as aforesaid shall be rendered to the mortgagee at the end of each and every ten days from the date hereof till this mortgage indebtedness shall be fully paid; and at the time of the rendering of such account the undersigned agrees to pay over and deliver to said mortgagee, its successors and assigns, the entire proceeds of all sales and collections made by him in said business less the reasonable and proper amount necessary to defray the expenses of operating said business, replenishing said stock, and compensation to the undersigned as above stipulated, the same to be applied in reduction of said indebtedness. It is further agreed, that all purchases of stock for the purpose of keeping up said business shall be kept strict account of, itemized and reported to the mortgagee, and that the same and the whole thereof shall be under the supervision, control and direction of said mortgagee."

It is not disputed that, if the above contract creates the relation of principal and agent between Goertz and the defendant for the purchase of goods, the latter is liable. This follows upon elementary principles, for the law is well settled that, where goods are purchased by an agent without disclosing the name of his principal, the latter may be held liable for the debt when he is discovered.

Mechem on Agency, section 695; Inglehart v. Thousand Island Hotel Co., 7 Hun. 547; Beebe v. Robert, 12 Wend. 413, 27 Am. Dec. 132; Taintor v. Prendergast, 3 Hill, 72, 38 Am. Dec. 618; Coie-man v. First National Bank of Elmira, 53 N. Y. 388; Hubbard & Co. v. Ten Brook, 124 Pa. 291, 16 Atl. 817, 2 L. R. A. 823, 10 Am. St. Rep. 585; Borchering v. Katz, 37 N. J. Eq. 150. The only question at issue is whether, under this contract, the purchase of the goods by Goertz was in his individual capacity as principal, on his own account and for his own benefit, or for the benefit of the defendant, and as defendant's agent. If purchases by Goertz under this contract were for his own benefit and on his own account, then the defendant is not liable; but if, on the other hand, the contract establishes an agency in Goertz to make purchases for and on behalf of, and for the benefit of, the defendant, in that event the defendant is liable, and the complaint states a cause of action.

The validity of the contract is not challenged by counsel for either party. On the contrary, its validity is expressly assumed. As between the parties, this is, no doubt, a proper assumption. Wait on Fraudulent Conveyances, section 353; Greenebaum v. Wheeler, 90 Ill. 296. Whether it is valid as against judgment and attachment creditors of the mortgagor is a different question, and one upon which we need not express an opinion. We agree with the contention of the plaintiff that the contract created the relation of principal and agent between the defendant and Goertz, and that the purchase of goods from plaintiff by Goertz for use in the business was for the benefit of the defendant, and that it is liable therefor. It will be noted that the instrument is not a mere mortgage. If it were, the legal relations of the parties thereto would, of course, be merely that of mortgagor and mortgagee. They saw fit to embody in it additional provisions which are entirely foreign to a chattel mortgage proper, creating rights, obligations and duties different from and additional to those naturally arising out of the relation of mortgagor and mortgagee. If it be a fact that under the terms of the additional contract the defendant became the principal in operating the business—and we are clear that it did—it necessarily subjected itself to the liability of a principal in the purchase of goods by its agent, Goertz. It is not a sufficient answer to a suit against it for goods purchased for it by its agent that it was at the time of the purchase a mortgagee, and that the alleged agent was a mortgagor. It is true, Goertz had the title to the goods, and

he was the mortgagor, but he was also the defendant's agent, and when the additional relation exists the liabilities of the relation follow. We know of no rule of law which prohibits parties from incumbering their chattel mortgages with extraneous contracts, from which they hope to reap advantages not conferred by the ordinary chattel mortgage. Neither do we know of any rule of law or adequate reason, and none is suggested, which will enable them to escape such liabilities as are incident to the additional contract relation, merely because the instrument in which such contract is embodied also contains a chattel mortgage. Under the terms of the chattel mortgage proper, Goertz was entitled to possession of the mortgaged stock of merchandise until the defendant should take possession of the same for the purposes of foreclosure. But by the additional contract he transferred his possession and his right of possession to the defendant. He retained the bare legal title, but the possession of the entire stock of goods and the control and management of the business were transferred to the defendant. Goertz was left in possession, it is true, but not in his capacity as mortgagor or as owner, but merely as the defendant's agent. It is also true that he was authorized to sell and dispose of the stock, and to account for sales, and to keep up and replenish the stock, and make payment therefor from the proceeds of sales; but these were not acts in his own behalf as mortgagor and owner of the stock, but were duties required to be performed by him as defendant's agent. In the case of *Red River Valley National Bank v. Barnes*, 8 N. D. 432, 79 N. W. 880—a case in which the mortgagor was placed in charge of a stock of merchandise to sell the same at retail and account to the mortgagee—we held that the legal effect of the arrangement in that case was to create the relation of principal and agent between the mortgagor and mortgagee, and that in making sales and in conducting the business the mortgagor was the agent of the mortgagee. The cases are numerous in which mortgagees have constituted mortgagors their agents to sell the mortgaged goods. See cases cited in *Red River Valley National Bank v. Barnes*, *supra*. As between the parties, at least, there is no prohibition upon the creation of such an agency, and for the same reason it was competent for the mortgagee to make the mortgagor its agent to purchase goods to replenish the mortgaged stock. The parties themselves, by the express terms of the contract, have characterized their relation as that of principal and agent. The contract, after

stating that Goertz should remain in possession and control, states that "such possession and control shall be under the direction, supervision and control of the said Grand Forks Mercantile Company or such person as it may designate therefor in case said mortgagee shall at any time after the execution of this mortgage decide to take the possession and control of said business from the undersigned." In other words, the contract expressly provides that the possession of Goertz shall be the defendant's possession, that his control shall be its control, and that he is subject to be removed at defendant's election; and the complaint elsewhere alleges that he was in fact removed by the defendant prior to the commencement of this action, and another person placed in control of the business. It would seem that the provisions to which we have called attention leave no room for doubt that the parties intended to create the relation of principal and agent. But this is not all. The contract contains the following recital, which is conclusive as to their intention: "It being expressly understood and agreed that the possession, control and management of the undersigned [Goertz] shall be considered the possession and control of the said mortgagee, and the said undersigned during the continuance of this mortgage shall be considered as the agent of said mortgagee." The language just quoted was evidently inserted for the sole purpose of entirely removing the possibility of any uncertainty as to the legal relation which Goertz should sustain, and to effectually negative any right of possession or authority in the control and management of the business in him individually, as mortgagor or owner. It is thus seen that Goertz was made the defendant's agent in every capacity in which he was authorized to act. It was one of his duties under his agency to buy goods to replenish the stock. The complaint alleges that he bought the goods in question for that purpose, and at a time when the relation of principal and agent existed between him and the defendant. The complaint therefore states a cause of action.

It is said that there is no precedent to sustain a liability upon a state of facts like that which exists in this case. So far as we are advised, this is true. Neither is there a precedent to the contrary. The lack of precedents may be due to the fact that mortgagees of merchandise do not, as a rule, contract with their mortgagors to take over the possession, control and management of their goods and business, and undertake to prosecute the same as a business indefi-

nately, for the sole purpose of securing its net profits to apply on the debt, as was done in this case. It is somewhat unusual for a mortgagee to waive his right to the proceeds of the mortgaged property, and contract merely for profits, which are necessarily uncertain. However that may be, precedents are not needed. The case turns upon the elementary principles of the law of agency. There is nothing sacred about the relation of mortgagors and mortgagees which prohibits them, as between themselves, from entering into other contract relations, if they see fit to do so. And when such additional contractual relations are established, their rights and liabilities thereunder as to each other and as to third persons are to be determined by the terms of their contract, the same as in any other case. Under the contract in this case, the mortgagor transferred the possession of his merchandise and business, including its control and management, to the defendant, and the defendant became the principal in the further prosecution of the business. The contract provides that the relation thus established shall continue "till this mortgage indebtedness shall be fully paid." The relation thus created was not terminated either by foreclosure by the mortgagee or by payment by the mortgagor, but was in full force and effect when Goertz purchased the goods in question from the plaintiff. As already stated, this case is, we believe, upon its facts, without precedent. The following cases are, however, closely in point upon principle, and sustain our conclusions: *Inglehart v. Thousand Island Hotel Co.*, 7 Hun. 547; *Hubbard v. Ten Brook*, 124 Pa. 291,, 16 Atl. 817, 2 L. R. A. 823, 10 Am. St. Rep. 585.

The judgment is reversed. All concur.
(99 N. W. 55.)

GEORGE W. FIFER V. WILLIAM J. FIFER.

Opinion filed December 14, 1903.

On Appeal De Novo Case Heard on Same Theory as Tried Below.

1. Where an action which is shown by the pleadings to be a combination of an action of forcible entry and detainer and an action in the nature of ejectment to try title has, by plaintiff's consent, been tried and determined by the district court as an action to try title and right of possession, and judgment for possession has been rendered in his favor upon that theory of the action, upon an appeal by defendant and demand for trial de novo in this court, under section 5630, Rev. Codes 1899, the plaintiff will not be heard to assert that

the action is in fact one of forcible entry and detainer, and that the question of title and right of possession cannot be reinvestigated in this court. The parties having submitted the cause to the district court for determination as one involving title, it will be so treated by this court upon appeal.

Assignment of Land Contract—Equitable Mortgage.

2. Defendant executed and delivered to plaintiff a written assignment of a contract for the purchase of certain land, and the latter entered into possession. One year later the defendant retook possession. In an action for the recovery of possession, in which plaintiff alleges that he is "the owner" of the land, and "entitled to possession thereof," it is *held*, upon an appeal de novo in this court and upon the facts narrated in the opinion, that the assignment to plaintiff was not absolute, but was given for security only.

Appeal from District Court, Ramsey county; *Cowen*, J.

Action by George W. Fifer against William J. Fifer. From a judgment for plaintiff, defendant appeals.

Reversed.

Townshend & Denoyer, for appellant.

Title is a legitimate defense in an action of forcible entry and detainer in this state. *Murry v. Burris et al.*, 6 Dak. 170, 42 N. W. 25; section 6677, Rev. Codes 1899, subdiv. 1.

As a general rule the defendant cannot plead title in himself or in third persons to defeat the right to recover on a basis of prior actual possession, *except in a few states where provision is made for transferring the cause to a court competent to try title*. 9 Enc. Pl. & Pr. 64.

This case must be tried and determined by this court upon the same theory pursued below. 2 Cyc., pp. 670 to 692 and cases cited; 21 Enc. Pl. & Prac. pp. 664 to 668; *Davis et al. v. Jacoby*, 55 N. W. 908; *Van v. Rouse*, 94 N. Y. 401; *James et al. v. Wilson et ux.*, 8 N. D. 186, 77 N. W. 603; *Marshall v. Andrews*, 8 N. D. 364, 79 N. W. 851; *Conner v. National Bank of Dakota*, 64 N. W. 519; *Moquist et al. v. Chapel*, 64 N. W. 567; *Power v. Bowdle*, 3 N. D. 107, 54 N. W. 404; *Estey v. Birnbaum*, 68 N. W. 290; *Western Town Lot Co. v. Lane*, 62 N. W. 982; *Perry v. Beaupre*, 50 N. W. 400; *Graham v. Selbie*, 74 N. W. 439; *Noyes v. Brace et al.*, 70 N. W. 846; *Baird v. Woodard*, 61 N. W. 612; *Aultman, Taylor Co. v. Gunderson*, 60 N. W. 859.

McClory, Barnett & Adamson, for respondent, and *Guy C. H. Corliss*, of counsel.

The plaintiff's action was begun in justice court under section 6677, Rev. Codes 1899, and certified to the district court by such justice. Defendant by answer interposed a purely equitable defense, and upon the trial thereof objection was made by plaintiff to all evidence of the defendant in support of such defense.

The defense interposed by the appellant is not available in an action of forcible entry and detainer. *Chicago, M. & St. P. Ry. Co. v. Nield*, 92 N. W. 1069, 9 Enc. Pl. & Pr. 66; *Torrey v. Burke*, 76 N. W. 302; *Ill. Cen. Ry. Co. v. Baltimore, etc.*, 23 Ill. Ap. 531; *St. Louis, etc. v. Wiggins Ferry Co.*, 102 Ill. 514; *Brown v. Haseltine*, 70 N. W. 648.

Neither counterclaim nor set-off can be pleaded to an action of forcible entry and detainer. *Abrams v. Watson*, 59 Ala. 524; *Kelly v. Teague*, 63 Cal. 68; *Warburton v. Doble*, 38 Cal. 619; *Folsom v. Clark*, 72 Me. 44; *Haynes v. Union Invest. Co.*, 35 Neb. 766, 53 N. W. 979.

In forcible entry and detainer, plaintiff, having proven possession, should be entitled to restitution though the fee simple title and present right of possession are shown to be in the defendant. *McCauley v. Weller*, 12 Cal. 500; *Romero v. Gonzales*, 3 N. Mex. 5; *Iron Mountain & Helena R. R. Co. v. Johnson*, 119 U. S. 608, 30 L. Ed. 504; *Vidger v. Nolin*, 10 N. D. 353, 87 N. W. 593; 13 Am. & Eng. Enc. of Law, 756; *Giddings et al. v. Land & Water Co.*, 23 Pac. 196.

Defendant must restore the possession unlawfully taken, and then, in a proper action in equity, he may redeem from the alleged mortgage created by an assignment of his contract and have such assignment set aside for fraud, if he can substantiate such a claim. *Dysart et al. v. Erslow*, 54 Pac. 550; *Gates v. Winslow*, 1 Wis. 650.

It is well settled that in an action of forcible entry and detainer title is not involved and evidence thereof is inadmissible. *Lehnan v. Dickson*, 148 U. S. 71, 13 Sup. Ct. Rep. 481; *Cunningham v. Green*, 3 Atl. 127; *Conroy v. Duane*, 45 Cal. 154; *Larkin v. Avery*, 23 Conn. 311; *Stephens v. McCloy*, 36 Iowa 659; *Gage v. Sanborn*, 106 Mich. 269, 64 N. W. 32; *Brown v. Feagins*, 37 Neb. 256, 55 N. W. 1048; *McDonald v. Stiles*, 54 Pac. 487.

Evidence shows that plaintiff's possession was actual, within the scope of the forcible entry and detainer statute entitling a party having actual possession to recover the same when taken from him by stealth. *Hammond et al. v. Doty*, 56 N. E. 371; *Wilson v. Shackelford*, 41 Cal. 630; *Leroux v. Murdock et al.*, 51 Cal. 541; *Huftalin v. Misner*, 70 Ill. 205; *Lewis v. Yoakum*, 32 S. W. 237; *Seals v. Williams et al.*, 31 So. 707; *Giddings et al. v. Land & Water Co. et al.*, 23 Pac. 196; *DeGraw v. Prior*, 53 Mo. 313; *Johnson v. Huffman*, 53 Mo. 504; *Powell v. Davis*, 54 Mo. 315, 13 Am. & Eng. Enc. of Law, 746.

YOUNG, C. J. The parties to this action are brothers. The action affects the right of possession and title of 320 acres of land situated in Ramsey county. The defendant purchased the land on the 24th day of June, 1899, from one Lemuel Berry, upon contract, and entered into possession thereunder, and continued in such possession until the spring of 1901, when plaintiff went into possession. On June 6, 1901, the defendant executed an assignment of his contract to the plaintiff. On the 24th day of February, 1902, thereafter, the defendant, claiming that the assignment to plaintiff was for security only, and that it was no longer in force, returned into possession; whereupon plaintiff instituted this action. The case was tried to the court without a jury. The findings of the trial court were in all respects favorable to the plaintiff, and judgment was entered in his favor, awarding to him the possession of the premises. The defendant appeals from the judgment, and demands a trial *de novo* of the entire case, under section 5630, Rev. Codes 1899.

It is urged in this court by counsel for defendant, as it was in the trial court, that the assignment of the contract to the plaintiff was merely for the purpose of security and in trust, and, further, that the assignment was procured by plaintiff through fraud, and should therefore be canceled. Counsel for plaintiff, on the other hand, contend that the assignment was absolute. They also strenuously contend that this action is one in forcible entry and detainer, and as such involves only the question of possession, and that the judgment of the district court must be affirmed by this court without re-investigating the question of title and right of possession. It is urged that the inquiry in a forcible entry and detainer action is confined to the actual peaceable possession of the plaintiff and the

unlawful or forcible ouster or detention by the defendant, the object of the law being to prevent the disturbance of the public peace by the forcible assertion of private rights, and that questions of title or right of possession cannot arise; that a forcible entry upon the actual peaceable possession of the plaintiff being proved, he is entitled to restitution, even though the present right of possession be in fact in the defendant. That this is a correct statement of the issues properly arising in a forcible entry and detainer action as that action generally exists is, without doubt, true. In this respect it differs from the action of ejectment. The distinction between an action of ejectment and one of forcible entry and detainer is well stated in Sedgwick & Wait on Trial of Title to Land, section 94, as follows: "The title or right of possession is always involved in the trial of an action of ejectment. The party who seeks to change the possession by ejectment must first establish a legal title to it, but the remedy for the forcible or unlawful entry is designed to protect the actual possession, whether rightful or wrongful, against unlawful invasion, and to afford summary redress and restitution. The forcible entry, even of the owner himself, and still more the entry of another person, whether forcible or not, is unlawful. The title cannot be drawn in question in forcible entry proceedings, which are frequently conducted in tribunals having no jurisdiction to determine titles to real property. In the one case the question of the unlawful invasion of an actual possession only is involved; in the other the absolute right of possession is to be tried and determined."

It is contended, on the other hand, by counsel for the appellant, that under our forcible entry and detainer statute, which, in its phraseology, is different from any with which we are familiar, title may be placed in issue and litigated. Section 6677, Rev. Codes 1899, which is a part of the Justices' Code, provides that: "This action is maintainable, (1) when a party has by force, intimidation, fraud or stealth entered upon the prior, actual possession of real property of another and detains the same." The Iowa forcible entry and detainer statute, from which that portion of our statute, just quoted, was taken, authorizes the remedy when the entry is upon "the prior, actual possession of another in real property;" that is, when the entry is upon another's possession, regardless of the ownership. Our statute makes the remedy available when the entry is "upon the prior, actual possession of real property of an-

other." The difference in the phraseology of the two statutes constrained the territorial Supreme Court in *Murry v. Burris*, 6 Dak. 170, 42 N. W. 25, to hold that the action could not be sustained against one who enters upon the possession of his own real property, and that it is always permissible for the owner to show that the property upon which he entered was his own for the purpose of defeating the action, and that to this extent, under our statutory action of forcible entry and detainer, title may be litigated. Justice Tripp, speaking for the court in that case, said: "The material change, as will be observed, consists in placing the words 'of another' after the words 'real property' in our statute, instead of after the words 'actual possession,' as in the Iowa statute, whereby the meaning of the sentence is made to be (if the pronoun 'another' is made to qualify as its antecedent the noun immediately preceding, according to the usual rules of construction) that this action is maintainable where a party has entered by force, etc., upon the prior actual possession of another's real property, while the meaning of the Iowa statute must be construed to be that the proceeding is maintainable where a party by force, etc., has entered upon another's prior actual possession; and if this change was intentional, as it will be presumed to have been, and the word 'another' is made to qualify its preceding noun as antecedent, then the difference in the two statutes is radical in this respect, that, while the Iowa statute applies to all real property, and makes the party who enters by force, etc., upon his own as well as upon the real property of another held adversely, guilty of this offense, our statute makes the party guilty only who enters by force, etc., upon the real property of another; and while it would be no defense in Iowa to allege and prove that the defendant was the owner of the premises alleged to have been unlawfully entered, it would be a perfect defense under our statute, which confines the remedy to lands of another so entered upon."

The conclusion which we have reached as to the issues involved in the action before us renders it unnecessary and improper to discuss and determine whether the effect of our forcible entry and detainer statute is to modify the otherwise unanimous rule in forcible entry and detainer actions, and to permit a defendant to inject the question of title. The pleadings and proceedings had in the lower court show that the action is one to try title. The complaint alleges that the plaintiff is "the owner of" the land, and "entitled to the

possession" thereof, and that he was, at the times named in the complaint, in the peaceable and absolute possession thereof; that on or about the 24th day of February, 1902, the defendant, with force and arms, and by fraud and stealth, and in the nighttime, wrongfully and unlawfully entered upon and took possession of the premises, and has since unlawfully withheld the same; and demands judgment for the immediate possession thereof. The defendant, in his answer, denies generally the allegations of the complaint, and alleges that one Lemuel Berry was formerly the owner in fee of the land in question; that he entered into a contract in writing with the defendant, whereby he agreed, upon the performance of certain conditions, to convey the same to the defendant; that on the 6th day of June, 1901, the defendant assigned the contract to the plaintiff; that said assignment was wholly without consideration, and, further, that while it was absolute on its face, in truth and in fact said assignment was made by the defendant and accepted by the plaintiff in trust for this defendant, and not otherwise; that by the terms of said trust plaintiff agreed to farm said land and use the proceeds thereof in paying certain indebtedness owed by the defendant; that plaintiff has wholly failed to discharge the duties of his trust, and, on the contrary, has converted all the proceeds of the farm to his own use. Defendant further alleges that the plaintiff has no right, title or interest in the premises, or right of possession thereto; that defendant is now, and at all times mentioned in the complaint has been, the owner and entitled to the possession thereof, subject to his contract with said Lemuel Berry; and prays that "the plaintiff take nothing by this action, and that defendant have his costs and disbursements." The findings of fact and judgment recite that this is "an action concerning the title to real property." The case is brought here for a review in its entirety upon all of the issues litigated in the trial court—a court of general jurisdiction. Whether the action was commenced in justice court and certified to the district court, or brought to the district court by appeal, or whether it was instituted originally in the district court, we are not advised. The abstract, upon which our decision must be based, is silent upon this point. However that may be, it is clear that the action as it was tried in the district court was an action to try title. The plaintiff based his demand for possession upon an allegation of ownership and right of possession. It is true the complaint contains allegations which are proper in a forcible entry and detainer action,

but it also alleges that the plaintiff is the owner and entitled to possession. These allegations are no part of a complaint in the action of forcible entry and detainer proper, and their presence in the complaint can only be reconciled upon the theory that the plaintiff desired to try his title and right of possession. Upon these allegations the defendant tendered issue by a denial of plaintiff's title and right of possession, and in addition alleged that his assignment of the contract to plaintiff was merely in trust. It is thus seen that the plaintiff himself, in his pleadings, tendered the issue of title and right of possession. But, even if this were not so, it was competent for the parties to waive their right to have the action proceed as a forcible entry and detainer action proper, and to convert it into an action in the nature of ejectment to try title; and that they did so try it does not admit of doubt. The plaintiff not only alleged that he was the owner of the property, but the first evidence offered by him upon the trial was the Berry contract and the defendant's assignment to him, neither of which had any relevancy whatever upon the issues in a forcible entry and detainer action proper, where the question is, upon plaintiff's theory, merely one of plaintiff's peaceable possession and his ouster by the defendant. These documents could have been offered under no other theory than that title was involved. The evidence relating to plaintiff's peaceable possession and the defendant's entry occupies an insignificant portion of the record. Practically all of the testimony introduced by the plaintiff as well as the defendant relates to the question of title. Nowhere in the record is there a single objection that that question was not in issue, or that it could not properly be litigated in the action. It was in fact litigated and determined, and the judgment from which this appeal is taken would estop the defendant from asserting his equitable rights in another action. The trial court found that the assignment to plaintiff was made "for a good and valuable consideration," and both the findings of fact and the judgment recite that the action was one "concerning title." The point which plaintiff now makes is made for the first time in this court. It was not presented to the trial court in any manner whatever. His attitude in the trial court was that the title was in issue. He procured a determination favorable to himself upon that issue. It is too late, therefore, at this time, to urge that his action was in fact a forcible entry and detainer action, and that title and right of possession could not properly be litigated therein. It is

elementary that litigants cannot try their actions upon one theory in the district court and upon a different theory in this court. *Marshall v. Andrews & Gage*, 8 N. D. 364, 79 N. W. 851; *James v. Willson*, 8 N. D. 186, 77 N. W. 603; *Broughel v. Telephone Co.*, 72 Conn. 617, 45 Atl. 435, 49 L. R. A. 404; *Peteler Ry. M. Co. v. Adamant Co.*, 60 Minn. 127, 61 N. W. 1024; *Nicholson v. Dyer*, 45 Mich. 610, 8 N. W. 515; *Harper v. Morse*, 114 Mo. 317, 21 S. W. 517; *Graves v. Barrett*, 126 N. C. 267, 35 S. E. 539. See also, 2 Cyc. pp. 670 to 692, and cases cited. Also, 21 Enc. Pl. & Pr. pp. 664 to 668, and cases cited. The case must therefore be treated in this court as it was treated by the parties themselves in the trial court—as an action in the nature of ejectment to try title.

Our conclusions upon the merits differ from those of the trial court. We are convinced, after a careful consideration of the testimony, that the assignment of the Berry contract to plaintiff, and upon which he bases his right of possession and claim of title, was not absolute, but was given for security only. This conclusion rests upon facts and circumstances which are not in dispute, and upon documentary evidence. The facts are substantially these: On January 30, 1901, the defendant, while laboring under mental depression, caused by repeated disagreements with his wife, left his home and family in Ramsey county, and went to Oregon, without informing either his wife or any one else of his destination. His property at that time consisted of a government homestead, upon which he had not made final proof, the value of which is not disclosed by the record; his equity in the land in controversy, probably of the value of \$1,500; and personal property consisting of ten horses, farm machinery and grain, all of the probable value of \$1,500. He was indebted about \$900. Four hundred and eighty dollars of this sum was due to one J. H. Smith, of Crary, and was secured by a chattel mortgage upon his stock and machinery and upon the crops to be grown upon the land involved in this action. The plaintiff was guarantor of a part of the Smith indebtedness. The defendant's contract with Berry required him to put in crop each year a specified number of acres, and was forfeitable for a failure to comply therewith. The defendant first disclosed his whereabouts in March, 1901, when he wrote to the plaintiff, asking him to tell Smith to close the mortgage on his stock and implements, and to sell them at the best advantage and apply the money on his notes, and that anything lacking he would pay as soon as able. Some time

later the plaintiff wrote to defendant, offering to "straighten up" his debts if he would give him an assignment of the land contract. Neither of these letters are in evidence. Under date of May 6, 1901, the defendant acknowledged the receipt of plaintiff's letter containing the offer to straighten up his debts, in which he says: "George, you don't know how it relieves me to have all my business straightened up out there. I have studied about nothing but the children and my business since I have been here. Have the papers fixed up right and send them to me and I will sign them." The plaintiff had Smith prepare an assignment of the Berry contract, and also a bill of sale of defendant's personal property, and the same were sent to the defendant for execution. The letter accompanying them appears to have been lost. The assignment and bill of sale were signed by the defendant upon their receipt, but were not immediately returned. On the contrary, and before sending them, he wrote to the plaintiff for further information in regard to his business affairs. The plaintiff did not answer this letter. Defendant then wrote to Smith, and finally to his wife, requesting detailed information in regard to what had been done since he left. Smith, who during this entire transaction acted as plaintiff's agent, under date of June 15, 1901, and at plaintiff's request, wrote to the defendant, giving him, in part at least, the information requested. This letter is in part as follows: "He [George] asked me what was best. * * * Your wife also came down to see me and get advice what to do. There was one of four things to do; either let George take the matter up and go on with it; or, for me to do it; or, your wife to do so; or, close up the whole matter and let the land go. I had a mortgage on the stuff and half the crops; could have foreclosed the mortgage, put in the crop and took half of it. This I would not do, for it is too much trouble and expense. Your wife could hardly do it, for she would have to have a lot of help, which no person would care to give, as they would lose in case of a failure of crop. It seemed too bad to let the land go, as it was worth more than there was against it. So I advised George and your wife to have George go on with the farm, which he has done. * * * George has sold one of the driving colts * * * for one hundred dollars, which is endorsed on your note, and will sell those that are not wanted on the farm the first chance he gets, at least I advised him to do so. A bill of sale or a foreclosure of my mortgage will be necessary some time in order to make title

to the implements and stock. Really, George or myself have no right to sell unless he gets a bill of sale or I foreclose. I don't want to foreclose and think a bill of sale to George will be the best; but do just as you like. * * *

The plaintiff's family "think he should be looking after his own business and not others quite as much as he is. * * * George has been your brother, your friend and the means of your getting here, and should receive some recognition in connection with this deal between you and him. * * *

Under the same date as the Smith letter, to wit, June 15, 1901, the defendant's wife also wrote him in part as follows: "I am running the place the same as if it was yourself, except that George is holding the stock and implements and standing good for your debts and farming the place. He has lived to the contract to the letter and will continue to do so. He has done seeding, or about it, and is breaking on the place now. Smith is working to our interest and we hope to pay your debts this fall as we have fine prospects for crop. George has sold John for one hundred dollars and broke Madge and Fan to buggy, and is asking two hundred fifty for them. Smith thought best to dispose of stock privately and let everything stand as you had left it, so in case of trouble everything would be all right. George has been good to us, and brings everything I ask for. * * * George has farmed that place the same as you would have done. * * * Now, I tell you again, I am trying to fill that contract. * * *

Upon receipt of the Smith letter, and on June 23, 1901, the defendant forwarded the bill of sale and assignment which he had theretofore executed. There is a dispute as to whether he had received his wife's letter at that time. That is not important, however. The Smith letter in itself sufficiently characterizes the transaction as one for security, and not a sale, and the letter from defendant's wife corroborates this view in every respect. On July 9, 1901, which was about two weeks after the assignment had been sent to Smith, the plaintiff wrote to the defendant as follows: "Now Juett, I did not ask for them papers to beat you out of them. I thought if you was going to let it go I would like to have it. When I get it paid for I will try and help you out any time you need it. * * * Will try and answer any questions you ask." About this time the defendant became suspicious of the plaintiff's intention, and anxious because of the position in which he had placed himself. Under date of August 4, 1901, he wrote to the plaintiff in

part as follows: "I am going to make an appeal, not for sympathy or for finance, but right and justice to my children. * * * I have nothing; others have my earnings. * * * My appeal to you is this: Can you and will you take the Berry place, and run it just as if it were yours; take two-thirds for your trouble and expense; take the other third, make the payments on the land, keep the taxes paid, and the remainder of what is left pay Mr. Smith on my notes? And any of my stock or implements that you can dispose of at anything like a reasonable figure, do so, and pay the same to Smith. If you cannot sell them, keep them and work them for their feed. The colts, pasture them and hay them when they need it, and I will pay you for it, and any time I have any money I will send it to Smith. * * * If you and Smith are willing to all of this, send me a different bill of sale for me to sign, because you cannot touch one thing that is not mentioned in the bill of sale. * * * You are to keep the land contract and bill of sale until I return, and then you are to turn the same over to me. * * * When you send the papers for me to sign, send the bill of sale also, so I can sign them both at once, for it is a long and rough ride to get to a notary public. * * * Now George, if you are not willing to do this that I have asked of you, get me a receipt from Smith clear of all accounts, notes, mortgages, etc.; the same from Giles & Miller and Wright & Stevens and send them to me." The plaintiff did not answer this letter, but had Smith do so. Under date of August 10, 1901, Smith wrote as follows: "George gave me a postal outline of the contents of your letter to him, and I will reply, as I promised him to do. * * * As to bill of sale for stock, etc., everything not covered by it is held by my chattel mortgage, so that it is all right. * * * It seems to me that the contract for the Berry land is best just as it stands. George is your friend, and not your only friend either. He has helped you before and I believe will help you again when the time comes. * * *"

The plaintiff did not return a receipt for the defendant's indebtedness, or any portion of it. Neither has he returned, or offered to return, to the defendant, those portions of the personal property which he took possession of, and which were not included in the bill of sale, but still retains the same. On or about the 1st day of January, 1902, the defendant returned to Ramsey county, and became reconciled to his wife. He called on Smith for assistance in procuring a settlement with his brother, and also

informed his brother that he was going to live with his family, and that he desired to make a settlement with him, and offered to reimburse him for all his expenditures and pay him \$300 in addition. This offer, which was made before the defendant re-entered into possession of the premises, was rejected by the plaintiff.

Upon the facts thus partially narrated, the conclusion that the assignment was given and received as security does not admit of doubt. Before the bill of sale and assignment were executed, the plaintiff had taken possession of all of defendant's chattel property, and had entered into possession of the land, and had almost completed seeding; all through an arrangement made with Smith and assented to by defendant's wife, which arrangement concededly was made for the purpose of paying defendant's debts and saving the land. The language of the correspondence preceding and attending the giving of the bill of sale and assignment is not the language of a bargain and sale. The only conclusion which can be drawn from the circumstances themselves is that the defendant intended by the bill of sale and assignment to protect his brother as to liabilities already existing and such further liabilities as he would incur in conducting defendant's farming operations for him. The amount of defendant's equity in this land and the chattels included in the bill of sale was at least of the value of \$2,000. Although he was temporarily estranged from his wife, he was devoted to his children. It is not conceivable that he intended to sell all he had in the world to his brother for \$2,000 less than it was worth, or that he intended to bestow that sum upon him as a gift. But the intent with which these instruments were given and received is not left to conjecture, or to the uncertainty of oral testimony. The Smith letter, which induced the defendant to forward the instruments, stated clearly the relation which existed between these parties when the instruments were exchanged, and the intention with which they were given: "I advised George and your wife to have George go on with the farm, which he has done. George has sold one of the driving colts * * * for one hundred dollars, which is endorsed on your notes, and will sell those that are not wanted on the farm the first chance he gets, at least I advised him to do so." The letter of defendant's wife, written on the same date, is to the same effect: "George is holding the stock and implements and standing good for your debts, and farming the place. He has lived to the contract to the let-

ter and will continue to do so. * * * Smith is working to our interests and we hope to pay your debts this fall as we have fine prospects for crop." Smith also, in his letter, explained that the purpose of the bill of sale was to enable them to dispose of such personal property as could be spared at private sale, to apply upon the defendant's debts; and that the object of the assignment of the land contract was to protect the plaintiff in the labor already expended upon the farm, and in such further expenditures as he would make in looking after the defendant's business. The language of the correspondence above quoted cannot be construed to refer to an absolute sale. So, too, the same may be said of their subsequent correspondence, when the defendant, in August, appealed to his brother for the protection of a definite agreement as to the future operation of the farm. He was not told by the plaintiff that he had bought the farm and was satisfied with his bargain. On the contrary, Smith, answering for him, said: "As to the bill of sale for stock, etc., everything not covered by it is held by my chattel mortgage, so it is all right. * * * It seems to me that the contract for the Berry land is best just as it stands. George is your friend and not your only friend either. He has helped you before and I believe will help you again when the time comes." It is charitable to assume that when the plaintiff took charge of all of defendant's chattels, and later, when, under authority from Smith and defendant's wife, he took possession of the land and put in the crop, and, still later, when he requested the bill of sale and the assignment, his purpose was in truth to act a brother's part in conducting his brother's business, and that these instruments were obtained only for the purpose of protecting him in such liabilities as he had already incurred or would incur in the future. It may be that Smith spoke truly when, on the 23d day of June, 1901, he wrote to the defendant, "He is your brother and your friend." The change in plaintiff's attitude in this transaction is sufficiently explained. When the defendant returned, the land had risen at least \$1,000 in value. The plaintiff had marketed a crop of flax, which returned a gross sum of over \$5,000. He had in his possession a bill of sale of the defendant's chattels and an assignment of the Berry contract, both of which were absolute upon their face. The original value of defendant's interest therein was at least \$3,000. Plaintiff paid nothing for either the land or the chattels, and the only obligation which he pretends to have as-

sumed was to "straighten up" defendant's debts, which did not exceed \$900. He made no express promise, either orally or in writing, to reassign the contract, or to restore the personal property under any condition. From the fact that he made no such express promise he assumes that both the bill of sale and the assignment must stand as an absolute sale. In this he is mistaken. It has always been the rule in courts of equity that transactions are to be judged by what they actually are, and not by what they may seem to be. A promise to restore would aid in characterizing the transaction; but where the transaction is one for security in fact a promise is not essential. A court of equity will look to the substance of every transaction, and, when convinced that a transfer of an interest in property was made only for security, it will consider it as such, and determine the rights and obligations of the parties on the basis of that relation. This equitable rule is embodied in the statutory law of this state. Section 4701, Rev. Codes 1899, in part provides: "Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act is to be deemed a mortgage. * * *" When the defendant returned to the possession of the land in February, 1902, the obligation secured by the assignment had been fully discharged, and the assignment was no longer operative as security. The record does not disclose the exact sums realized by plaintiff from the sale of the defendant's chattels. The plaintiff himself testified, however, that the crop of 1901 was sold for more than \$5,000. This sum was greatly in excess of all obligations secured by the assignment. Upon this state of facts the assignment furnishes no ground whatever for the plaintiff's present claim of the right of possession and title to the land in controversy. Defendant, in the prayer in his answer, does not ask for either an accounting, a cancellation of the assignment, a reassignment of the same, or for any equitable relief, but merely that "the plaintiff take nothing," etc. The matter of an accounting must therefore be left for determination in an independent action.

The district court is directed to vacate its judgment, and enter judgment dismissing the action. Appellant will recover his costs and disbursements in both courts. All concur.

ON REHEARING.

PER CURIAM. The plaintiff urges in his petition for rehearing that the statement in the foregoing opinion that there are no existing obligations secured by the assignment of the land contract is a finding upon a question not in issue or litigated by either party in the trial court, and that the question of an accounting between these parties should not be prejudged in any respect, but left open for future determination in a proper action. We have concluded, after a re-examination of the record, that this criticism is just. The plaintiff has based his claim of ownership of the land and the right of possession thereof solely upon the ground that the assignment of the land contract was absolute, and at no stage of the proceedings has he asserted a right of possession, either as trustee or as mortgagee. It follows, from our conclusion that the assignment was in fact for security, that this action must fail. The direction that the action should be dismissed was proper, but the dismissal should have been ordered without prejudice to the future determination in another action of any rights which the plaintiff may have as trustee or mortgagee, and a full accounting.

As thus modified, the original opinion will be adhered to, and the petition for rehearing denied. All concur.

(99 N. W. 763.)

SOPHIA A. SIGNOR v. G. LEE CLARK.

Opinion filed January 16, 1904.

Appeal — Waiver of Right — Satisfaction of Judgment.

1. Plaintiff brought an action for an accounting and for the cancellation of a deed. After a trial the deed was declared a mortgage and on August 20, 1902, was ordered foreclosed, and the land sold to satisfy what was due from plaintiff to defendant thereon. A statement of case in view of an appeal was settled on December 18, 1902. On April 8, 1903, the land covered by the mortgage was sold, and bid in by defendant for the full amount of the judgment. On June 6, 1903, defendant redeemed from a prior sale of the premises purchased by him under his foreclosure decree, by paying the full amount of such prior foreclosure. The time for a redemption under such prior sale expired on July 12, 1903. On July 11, 1903, plaintiff, through her attorney, negotiated for a loan to her of a sum sufficient to pay all of her mortgage and judgment indebtedness, on condition that all prior liens of whatever kind be released, paid or satisfied. A satis-

faction of the judgment in defendant's favor was delivered to plaintiff's attorney, and the full amount of the judgment paid to defendant's attorney, together with the full amount paid by defendant on the redemption from the prior sale. Neither the payment of the money and delivery of the satisfaction nor the redemption were made under any express understanding as to waiver or reservation of the right to appeal. *Held*, that the payment of the money and the acceptance of the satisfaction extinguished the judgment and the cause of action, and the right to appeal was waived.

Duress.

2. The payment of a judgment under coercion or duress imposed by execution of legal process is not a waiver of the right to appeal.

Appeal from District Court, Cass county; *Charles A. Pollock, J.* Action by Sophia A. Signor against G. Lee Clark. Judgment for defendant, and plaintiff appeals.

Dismissed.

William B. Douglas and Morrill & Engerud, for appellant.

Payment of judgment either before or after execution, or before or after appeal, is no bar to an appeal, nor evidence of intent to abandon the appeal.

By accepting benefits under the judgment, right to appeal is waived. *Tyler v. Shea*, 4 N. D. 377, 61 N. W. 468; *Easton v. Lockhart*, 89 N. W. 75.

Where the subject matter of litigation is extinct appellant is estopped to appeal. *In re Kaeppler*, 7 N. D. 307, 75 N. W. 253.

Where appellant voluntarily pays judgment to end litigation there is no appeal. *Rollette Co. v. Pierce Co.*, 8 N. D. 613, 80 N. W. 804.

The mere fact of voluntary payment of a judgment pending appeal is no waiver of right to appeal. Such a payment is not voluntary in the sense that the term is used in an action for money had and received, or similar situations. While respondent has power to enforce payment, appellant has right to pay without waiting for compulsion and such payment is involuntary. *State v. Albright*, 11 N. D. 22, 88 N. W. 729; *Erwin v. Lowry*, 7 How. 184, 12 L. Ed. 655; *O'Hara v. McConnell*, 93 U. S. 154, 23 L. Ed. 840; *Burrows v. Mickler*, 22 Fla. 574, 1 Am. St. Rep. 218; *Morris v. Garland*, 78 Va. 235; *Clark v. Ostrander*, 1 Cowen, 437, 13 Am. Dec. 546; *Hayes v. Nourse*, 107 N. Y. 577, 14 N. E. 508, 1 Am. St. Rep. 891; *Martin v. Johnston*, etc., 128 N. Y. 605, 27 N. E. 1017; *Grim v. Semple*, 39

Iowa 570; *Richardson v. Ryan*, 14 Ill. 74, 56 Am. Dec. 493; *Joannin v. Ogilvie*, 52 N. W. 217.

The definition of duress in Rev. Codes 3845 does not limit the right of appellant's appeal.

The coercion or duress which will render a payment involuntary must consist of some actual or threatened exercise of power possessed or believed to be possessed by the person exacting payment. *Radich v. Hutchins*, 95 U. S. 210, 24 L. Ed. 409; *Brumagim et al. v. Tillinghast*, 18 Cal. 265; *Joannin v. Ogilvie*, 52 N. W. 217; *State v. Nelson*, 42 N. W. 548; *Merkle v. Board of County Commissioners of Hennepin County*, 47 N. W. 165.

Actual interference with appellant's property so as to limit or cause the loss of the enjoyment of it unless the claim is paid does not bar an appeal when payment is thus enforced. *Joannin v. Ogilvie*, *supra*; *Panton v. Duluth Gas & Water Co.*, 52 N. W. 527; *State v. Nelson*, 42 N. W. 548; *Mearkle et al. v. Board of County Commissioners of Hennepin Co.*, 47 N. W. 165.

The filing of a formal written protest cannot make a voluntary payment involuntary. *De la Cuesta v. Ins. Co. of N. A.*, 9 L. R. A. 631; *Union Pac. Ry. Co. v. Board of Com. of Dodge Co.*, 98 U. S. 544, 25 L. Ed. 196.

R. M. Pollock and Newman, Spalding & Stambaugh, for respondent.

The rule laid down in all cases is that if the payment of a judgment is voluntary, and is of the whole judgment, the appeal will be dismissed, but if involuntary the motion will be denied. *State v. Albright*, 11 N. D. 22, 88 N. W. 729.

There are in this case none of the elements which is essential to render the payment involuntary. The judgment was entered August 20, 1902; notice served August 28, 1902; statement of case settled and filed December 18, 1902. The appeal was taken August 20, 1903, one year after the entry of judgment. No supersedeas bond was necessary. The appeal might have been taken by serving notice and filing a bond as early as December 19, 1902, or eight months before it was taken. The appeal could have been heard at the March, 1903, term of the Supreme Court.

In the ordinary course of events a decision would have been rendered before July 1, 1903. The execution sale took place April 8, 1903. The period of redemption would have expired in one

year from that time. On July 11, 1903, appellant paid the judgment in full and demanded a formal satisfaction, which was furnished and filed by the appellant in the clerk's office. Payment was not made after appeal was taken, but long before and when respondent had been led to believe that no appeal was to be taken, and at a time when appellant's property rights could not be affected by any action under respondent's judgment and sale for nearly nine months to come. No immediate and pressing danger to appellant's right could arise under the judgment during that time.

By prosecuting her litigation with reasonable diligence all her rights in the premises could have been protected by the means provided by law, long before that time would expire, and, in fact, before the payment was made.

If involuntary, the payment must have been made under compulsion, coercion and legal duress. *Brummagim v. Tillinghast*, 18 Cal. 272; *Forbes v. Appleton*, 5 Cush. (Mass.) 117; *Wright v. Boston*, 9 Cush. 241; *Mayor v. Jefferson*, 4 Gill. (Md.) 425; *Mays v. Cincinnati*, 1 Ohio Rep. 268; *Union Pac. R. R. Co. v. Com'rs. of Dodge Co.*, 98 U. S. 541, 25 L. Ed. 197; *Mannig v. Poling*, 83 N. W. 896; *Wessel v. Land Co.*, 3 N. D. 160, 54 N. W. 922.

If the appellant could have obtained relief in this action by diligent prosecution of this appeal, the payment was voluntary. *De Graff v. Ramesy County*, 48 N. W. 1135; *Town v. Akerman*, 46 Ind. 552, 15 Am. Rep. 341; *Regan v. Baldwin*, 126 Mass. 485, 30 Am. Rep. 689; *Hoke v. Atlanta*, 33 S. E. 412.

Financial circumstances or necessities are no ground for declaring the payment involuntary, or adjudging it to have been under legal duress. *Hipp v. Crenshaw*, 20 N. W. 492; *Emery v. City of Lowell*, 127 Mass. 138; *Austin v. City of Viroqua*, 30 N. W. 515; *Conn. Mut. Ins. Co. v. Stewart*, 95 Ind. 588.

MORGAN, J. The defendant moves to dismiss the appeal to this court from a decree entered in his favor in the district court. The grounds of the motion to dismiss are that the appellant voluntarily paid the judgment prior to the appeal; that the judgment was fully paid, and for her benefit, and at her request, and formally satisfied of record; and that her right to appeal was waived by such voluntary payment and satisfaction. The facts, as presented by the moving papers and counter showing, are as follows, so

far as material to the disposition of the motion: The appellant, Sophia A. Signor, was, on and prior to March 24, 1899, the owner of about 1,200 acres of land in Cass county. Her husband, George A. Signor, was then the owner of 160 acres of land in said county. In 1890 all of such land was incumbered by mortgage liens to the amount of about \$20,000. Such mortgages were held by various persons and corporations, and were so given that such lands were subject to the liens of several distinct and separate mortgages. Such mortgages given in 1899 were given in payment of mortgages and liens then existing on said land. In the year 1902 several of the above mentioned mortgages were foreclosed by a sale of the lands under the mortgages. Said Signors were farmers, and managed their farming affairs themselves up to the year 1897. In and since 1896 they were unable to pay their debts from the proceeds of their farms, and were consequently unable to meet their financial obligations, except by mortgaging their real and personal property. All of their said real and personal property, except household goods, was mortgaged in 1896, and have ever since been mortgaged. In April, 1897, the defendant, G. Lee Clark, and the Signors entered into an arrangement under which said Clark agreed to manage and operate their farms for them, and assist them in paying their debts. Said Clark had been their friend and confidential adviser, and was aware of their financial condition and embarrassment. The Signors were then old and infirm, and were thereby unfitted to do the active work incumbent upon the successful management of such large farming operations. In said year said Clark persuaded the appellant's son, Elmer L. Signor, who was then the equitable owner of section 17 of the lands involved in this suit, to quitclaim said section to him under representations that he (said Clark) could thereby better procure settlements of their indebtedness with creditors. The said Clark took possession of said land and all their personal property, and farmed said lands during the years 1897 and 1898. Thereafter the Signors became dissatisfied with said Clark's management, and claimed that he refused to account to them for the profits of said farms. They thereupon brought this action for an accounting, and for a cancellation of said quitclaim deed of section 17, which had been quitclaimed by Elmer L. Signor to plaintiff. The trial of the action in the district court resulted in a judgment declaring said quitclaim deed to Clark to be a mortgage, and find-

ing that the Signors were indebted thereon to Clark in the sum of \$4,578.31. A foreclosure of the mortgage was ordered, and a judgment for costs, taxed at \$78.40, was entered against the Signors. Said decree was entered on August 20, 1902, and the judgment for costs was docketed on the same day for said amount. On December 18, 1902, a statement of the case was duly settled, preliminary to an intended appeal from such judgment. On March 4, 1903, Clark gave the statutory notice, by publication, of a sale of the premises under a special execution issued on the foreclosure decree, and said section 17 was purchased by him on the sale on April 8, 1903, for the amount due on said decree, to wit, \$4,892.25. On July 12, 1902, a mortgage on said section 17 was foreclosed by a sale of the same, and bid in by one Jenkins for \$5,951.85. On June 6, 1903, said Clark did redeem from the sale to said Jenkins, and received a certificate of redemption from the sheriff of Cass county. The time for redemption from this mortgage foreclosure on these lands made July 12, 1902, would expire on July 12, 1903. The total sum of liens, judgments and incumbrances of every kind on these lands, including that of Clark, was more than \$26,000 at this date. On July 11, 1903, arrangements were made under which one Sarles agreed to furnish \$15,000 upon a first mortgage on some of the lands, on condition that all existing liens, judgments, incumbrances, redemption and sale certificates were paid up and discharged; and one Rindlaub agreed to pay \$9,000 and take a deed of all the Signors' lands, subject to Sarles' mortgage, and on the same conditions in regard to the discharge of existing liens as those exacted by Sarles. The conditions under which Sarles was to advance any money were as follows, as stated in the affidavit of Mr. Douglas, attorney for the appellant: "That on the 9th day of July, 1903, this deponent interested E. Y. Sarles in this matter, and the said E. Y. Sarles, on the 11th day of July, 1903, informed this deponent by telephone that, if there were no claims, cloud or incumbrances on the property, he would advance the sum of two thousand dollars on each quarter section, provided I could get some one else to take a claim junior to his, and referred this deponent to J. W. von Neida, * * * who would act for him." Mr. von Neida's affidavit says: "That he was instructed by said E. Y. Sarles not to pay any moneys until all the lands were clear on the record of all claims and demands, and this deponent so informed William B.

Douglas, the attorney for Sophia A. Signor. To that end he requested that all claims be presented, with the proper redemption certificates, releases, etc., * * * and that all such certificates of redemption, releases, etc., should at once be handed to Walter J. Lorshbaugh, of the Cass County Abstract Company, who would cause the same to be at once placed of record; and that the payments were so made, the papers exchanged and handed to Walter J. Lorshbaugh to be placed on the records." The conditions under which said Rindlaub advanced money to the Signors are stated by said Douglas as follows: "That on the 11th day of July, 1903, the said Charles A. Wheelock informed this deponent that he had consulted with J. W. von Neida, and that he could manage the matter through one John H. Rindlaub, a client of his. but that he must see that all foreclosures, mortgages, judgments or liens are redeemed, paid or satisfied, and that all such redemption certificates, discharges and satisfactions must be presented and turned over at the time the money was paid, and the securities given at the time the money was advanced." Said Wheelock testifies as follows as to the understanding: "That this deponent told William B. Douglas, the attorney for Sophia A. Signor, that all mortgage sales must be redeemed, and all mortgages not foreclosed must be redeemed, and the judgments must be so discharged that no claims or incumbrances should appear of record against the property, or words to that effect." On July 11th Elmer L. Signor requested Henry J. Hanson, deputy sheriff of Cass county, to furnish to him the amount necessary to be paid to redeem from the foreclosure sale to G. Lee Clark on April 8, 1903, and Hanson gave him the amount in the form of a memorandum, showing that it would take \$5,044 to redeem from said sale. Subsequently these figures were shown to Mr. Pollock, one of Clark's attorneys, and were approved by Mr. Pollock as correct, unless payment of said judgment was to be made by the owner of section 17 (the owner being Sophia A. Signor at this time), in which case the amount would be greater than the sum given to Elmer L. Signor by Mr. Hanson. At this time Mr. Pollock handed to said Hanson the following memorandum:

"Mem. Clark vs. Signors. Amount claimed by plaintiff if payment is made by owner:

Amount of sale April 8, 1903.....	\$	4,892 25
Interest at 12 per cent since sale.....		151 75
Paid by Mr. Clark to redeem.....	\$6,596 64	
Interest since June 6, 1903, at 12 per cent..	79 26	
		<hr/> 6,665 90
		<hr/> \$11,719 90''

After this memorandum was delivered by Mr. Pollock to the deputy sheriff in the presence of Signor, Mr. Douglas, as attorney for the appellant, had an interview with Mr. Newman, one of Clark's attorneys. What the subject between them was is subject to misunderstanding, and their memories of such conversation differ. Mr. Douglas claims that he asked for a satisfaction of the judgment for costs as docketed, for \$78.40. Mr. Newman says that a satisfaction of the whole judgment was called for. Later in the same day Mr. Newman delivered to Mr. Douglas a satisfaction in full of said judgment, with the certificate of redemption issued to respondent on his redemption from said first mortgage sale, and also the certificate of sale issued on the sale to Clark under the judgment in this suit. Mr. Newman had received a check for the whole amount of Clark's judgment and the full amount paid by him in redeeming from the prior judgment, with interest, from Mr. Wheelock at the bank, before the satisfaction and certificates were turned over to him. All these papers were turned over at the bank to Mr. Lorshbaugh, to be filed and recorded, and the abstract of title completed, showing these various transactions, as well as the mortgages to Sarles and the deed to Rindlaub. Upon application of appellant the sheriff issued a certificate of redemption to Sophia A. Signor from the sale of section 17 made to Clark on April 8, 1903.

This motion is based on numerous affidavits, in which there is no great conflict. Outside of the discrepancy in the affidavits of Messrs. Newman and Douglas, it may be said that the material facts are uncontradicted. Outside of the facts stated, there are others shown, which it is claimed have an important bearing upon the issue of law involved in the motion. It is claimed by appellant that the plaintiff, Mrs. Signor, on July 11th stated that she objected to the payment of the Clark judgment, but that she was advised by her attorney that she must do so, or she would lose her land. This is claimed to have been stated to the deputy sheriff. But, admitting it to be true, it has no evidentiary strength

as a protest or reservation of the right to appeal. Upon these facts the respondent insists that the appeal should be dismissed, as the judgment was voluntarily paid, and that the requested satisfaction of the judgment ended the litigation, and completely satisfied the cause of action, and waived the right of appeal. On the appellant's part it is insisted that such payment was made under legal coercion on account of the sale under execution of the appellant's lands, and was, in consequence, involuntary, and not a waiver of her right to appeal. The fact that Sarles and Rindlaub furnished the money with which to pay the judgment in suit throws light on the transaction, and renders it different than if appellant and respondent alone had participated in the payment and satisfaction. The conditions under which Sarles and Rindlaub agreed to furnish the money were absolute that the Signors' title should be unincumbered. It was to be clear of all liens, mortgages, judgments, and of everything that could or would cloud plaintiff's title. Their demands in this regard so often appear in the record that no doubt remains that it was their intention that, before their money would be advanced, the title must be released from all liens absolutely, without a possibility of its being questioned, or future litigation growing out of it. It is not material, in considering the intent under which the payment was made, whether an appeal from this judgment could or would affect their interests in any way, or, if the judgment should be reversed, that restitution could be ordered from Clark. It is sufficient to say that they insisted upon advancing the money under conditions of their own making, and which they had the right to make. Among these conditions was the one that all judgments should be paid. In the negotiations with them or their agents not a word was ever spoken that would tend to indicate that the payment or payment by redemption and satisfaction of the judgment were made with any other intent than as unconditional. No rights were saved. The satisfaction was accepted and retained and filed without conditions, express or implied, and no suggestion made that it was a satisfaction with conditions not expressed by it, until the appeal was made several weeks thereafter. The attorney now claims that it was accepted without critical examination in the hurry of redeeming from the judgment prior to the one in suit, before the right of redemption had expired. But the satisfaction was examined by him at the time. The least examination would disclose that it was more than

a satisfaction of the costs judgment as docketed. Under the circumstances surrounding and preliminary to the delivery of the satisfaction, as they transpired between all the parties to the proceedings, it must be held that the satisfaction expressed the intentions of the parties. If it be conceded that the attorney for the appellant requested a satisfaction of the judgment so far as docketed for costs only, the conclusion would be the same. By calling for the satisfaction it is shown that the intention was that its satisfaction by the payment made by redeeming from the sale should fully clear the record of the foreclosure judgment in whatever form entered thereon. By the negotiations prior to the paying over of the money and the acceptance of the satisfaction at the bank, it clearly and distinctly appears that all existing claims of whatever nature against this land must be paid, satisfied and released, and this was well known to the attorney who transacted the business for the appellant. Having complied with the conditions imposed before the money was turned over, the conclusion is irresistible, from reading the affidavits, that the satisfaction was given and the transaction fully and finally closed in accordance with the conditions imposed. It was not, therefore, a satisfaction nor a redemption made under stress of legal duress or legal menace, but voluntary, so far as the appellant is concerned. There is no proof that the respondent interfered in any way with appellant's affairs, other than in protecting his own interests. The judgment in this suit was awarded him in an action brought by the appellant. He redeemed from a judgment prior to his own only a month before redemption by him from such judgment would be impossible. The assertion in one affidavit that he interfered with prospective purchasers or mortgagees by disparaging and discouraging statements that kept such prospective purchasers from doing so is made in such general terms as to be valueless as the basis for any such finding. He was, by redeeming from said prior sale, only protecting his own interest, based on a judgment valid until shown not to be on appeal. He did not sell under his own judgment until nearly eight months after the judgment was rendered. If the appellant was reluctant to satisfy the judgment in this suit, it was due to her financial embarrassment and inability to redeem from the prior judgment that must be redeemed, if at all, at once. She could not borrow money to redeem unless the judgment in this case was released. Her financial embarrassment arose out of the

imminent danger of the expiration of the time for redemption from the sale on the prior judgment. She was compelled to borrow money before she could make such redemption, and could not borrow the money unless the judgment in this case was satisfied. Failure to borrow money on account of a judgment is not legal duress, so far as such judgment is concerned. As said in *Hipp v. Crenshaw*, 64 Iowa 404, 20 N. W. 492: "Defendant has filed his affidavit in resistance of the motion in which he swears that his circumstances were such that he was compelled to procure a loan of money and that, to enable him to procure such loan, he was compelled to give a mortgage on certain real estate to secure the same, and, as the judgment was a lien on said real estate, he was compelled to remove such lien before the parties from whom he had arranged to procure the loans would consent to accept the mortgage as security therefor. * * * A payment under such circumstances is not a payment under duress. All that can be claimed is that defendant found it to his advantage to discharge the lien of the judgment, and he paid the money for that purpose, and to enable him to procure the loan."

The facts, therefore, make the case one of voluntary payment. The payment alone would not defeat the appeal, nor would a redemption from the sale. But the circumstances here show an intention to have the judgment completely extinguished and satisfied. The circumstances bring the case within the provisions of section 5739, Rev. Codes, providing that "an action is deemed to be pending from the time of its commencement until its final determination upon appeal or until the time for appeal has passed, unless the judgment is sooner satisfied." The facts in this case go further than to make the payment compulsory, as simply a redemption, or as a payment made to save property from the effects of a levy of process. See *Thornton v. Madison Woolen Mills*, 41 Wis. 265. It is shown by the facts that the judgment was to be finally and unconditionally satisfied. This was a waiver of an appeal. If the appellant had rested with a redemption, a different question would be presented. In that case the authorities cited by appellant would be in point as holding the payment as a redemption not to be a voluntary payment, and no bar to an appeal. It does not change the force of the circumstances attending the acceptance of the satisfaction and the prior negotiations of appellant's attorney with Sarles and Rindlaub, or their agents, that appellant now says that there was no

waiver of the appeal and no award or settlement. The transactions are to be considered from the facts as they occurred, and they show beyond dispute that no money could have been obtained from these persons if the judgment in suit was to remain unsatisfied for any purpose. To hold it not satisfied, so as to defeat appeal, would be doing violence to any reasonable conclusion to be drawn from the undisputed facts that led up to and existed at the time the satisfaction was delivered, accepted and filed. The memorandum given by Mr. Pollock speaks of the amount as payment by the owner. The sum stated in that memorandum was paid over to the attorneys for Clark, and not to the sheriff. True, the sheriff issued a certificate of redemption, but it was unnecessary. Nor was a satisfaction of the judgment by Clark necessary. The judgment was satisfied by the sale, and a redemption by appellant would restore her to full rights, the same as though the judgment had not been rendered. Under the facts we think no conclusion can fairly be drawn except that the suit was abated and the appeal waived. In effect, it was an agreement not to appeal, though no words were used to that effect. That an appeal may be waived by acts and conduct is supported by authority. *Tyler v. Shea*, 4 N. D. 377, 61 N. W. 468, 50 Am. St. Rep. 660; *Rolette County v. Pierce County*, 8 N. D. 615, 80 N. W. 804; *Genet v. Davenport*, 59 N. Y. 648; *Monnett v. Hemphill*, 110 Ind. 299, 11 N. E. 230; *Thornton v. Woolen Mills*, 41 Wis. 265; *Easton v. Lockhart* (N. D.), 89 N. W. 75. Under section 5739, *supra*, the cause of action was extinguished by the satisfaction of the judgment. It was satisfied pursuant to appellant's consent, if not actual request. It was therefore voluntary on her part. It ended the litigation. In *re Kaeppler*, 7 N. D. 307, 75 N. W. 253; in *re Baby*, 87 Cal. 201, 25 Pac. 405, 22 Am. St. Rep. 239; *Cassell v. Fagin*, 11 Mo. 207, 47 Am. Dec. 151; *People v. Burns*, 78 Cal. 645, 21 Pac. 540; *Morton v. Superior Court*, 65 Cal. 496, 4 Pac. 489; *Medart v. Baker's Eureka Mfg. Co.*, 51 Mo. App. 19; *San Mateo County v. Southern Pacific Ry. Co.*, 6 Sup. Ct. 317, 29 L. Ed. 589. A satisfaction of a judgment not voluntarily made is not a bar to an appeal. This is true under statutes like section 5739, above cited. *Kenney v. Parks*, 120 Cal. 22, 52 Pac. 40; *Vermont Marble Company v. Black*, 123 Cal. 21, 55 Pac. 599; *Cassell v. Fagin*, *supra*.

From what has already been said, the case of *State v. Albright*, 11 N. D. 22, 88 N. W. 729, is clearly distinguished from the case at bar.

The motion to dismiss the appeal is granted. All concur.
(99 N. W. 68.)

MABEL MANNING v. THE CITY OF DEVILS LAKE, A MUNICIPAL CORPORATION, AND S. L. WINEMAN AS MAYOR, AND T. A. HASLAM AS TREASURER, AND OLE SKRATASS AS AUDITOR.

Opinion filed January 20, 1904.

Municipal Corporations — Validity of Its Contracts.

1. The validity of a contract of a municipal corporation which can be performed only by a resort to taxation depends upon the power of such corporation to levy and collect a tax for that purpose.

Can Construct Bridge Only on Legal Highway.

2. The taxing power of a city cannot be lawfully invoked by it to raise funds to construct a bridge which is not located upon a street or highway having a legal existence.

Tax Cannot be Levied for Purely Private Objects.

3. The taxing power of a city corporation can be exercised only for corporate purposes. The construction and maintenance of a bridge outside of its territorial boundaries, the purpose of which is not to serve the convenience of its inhabitants, but the convenience of the inhabitants of an outlying district, and to promote the business and commercial interests of the city by increasing the trade of its business men, is not such a corporate purpose as will sustain the exercise of the power of taxation.

Incidental and Indirect Benefits Insufficient.

4. The incidental and indirect benefits which accrue to the inhabitants of a city from the development of its commercial interests will not sustain the power of taxation.

Appeal from District Court, Ramsey county; *Cowan*, J.

Action by Mabel Manning against city of Devils Lake and others.
Judgment for plaintiff, and defendant appeals.

Affirmed.

B. D. Townsend, for appellants.

A municipality may establish and maintain public improvements outside of its territorial limits, where necessity requires them for

city purposes. *People v. Kelly*, 76 N. Y. 475; *Callam v. City of Saginaw* (Mich.), 14 N. W. 677; *Lester v. City of Jackson*, 69 Miss. 887; *Chambers v. City of St. Louis*, 29 Mo. 543; *Newman v. Ashe*, 68 Tenn. 380; *Hackett v. City of Ottawa*, 99 U. S. 86, 25 L. Ed. 363.

John C. Adamson, for respondent.

A municipal corporation has no power to make gifts of property or money. The building of the bridge in question was an attempted donation of public funds for the benefit of individuals. Constitution of N. D. 185.

The question is not one of enforcing police regulation, or of public health, or of finding outlets for sewer. Section 130 of the constitution directs the legislature to provide by law for the organization of municipal corporations and restrict their powers as to levying taxes, contracting debts, etc. This has been done by subdivision 2 of section 2148, Political Code, wherein the city council must confine its appropriation of money to corporate purposes; and this clearly prohibits lending of the credit of a city or gifts of its money to any project outside of its corporate limits, irrespective of benefits that its inhabitants might derive from such an expenditure.

If the right to use a corporate power is in doubt, the power is denied. *Van Antwerp v. Dells Rapids Township*, 53 N. W. 82; *Minturn v. LaRue*, 23 Howard 435, 16 L. Ed. 574; *Hanger v. City of Des Moines*, 2 N. W. 1105; *Dill Mun. Corp.* (4th Ed.) 89.

YOUNG, C. J. The defendants appeal from an order of the district court of Ramsey county continuing a temporary injunction, made upon an order to show cause. The action in aid of which the restraining order was issued is brought for the purpose of permanently enjoining the defendants from issuing and negotiating certain bonds which it proposes to issue for the purpose of constructing and maintaining a certain road or bridge across an arm of Devils Lake. The plaintiff alleges in her complaint that she is a resident, property owner and taxpayer in the city of Devils Lake; that said city is a municipal corporation organized under the laws of this state; that, at a city election called for that purpose, a majority of the electors voted to issue bonds of said city, in the sum of \$6,500, for the purpose of paying the cost of construction and maintenance of a certain bridge, known as the "Pelican Point Bridge,"

and for paying outstanding warrants of the city of Devils Lake, issued in aid of such purpose; that the defendant Ole Skratass, the auditor of said city, has advertised for bids for said bonds; that said Pelican Point Bridge is located several miles outside of the corporate limits of said city; that the acts of the defendant and its officers in attempting to issue and dispose of said bonds for the purpose aforesaid are ultra vires and wholly void. The complaint further alleges that the officers of said city have issued a large number of city warrants, to wit, in the sum of at least \$6,000, to aid in the construction of said bridge, and that the same are unpaid, and are about to issue other warrants and expend the moneys of the corporation for said purpose, and prays that defendants be restrained and enjoined from disposing of and issuing said bonds, and from diverting any funds of the corporation to said purpose, and from paying the outstanding warrants. Upon the foregoing complaint and upon plaintiff's affidavit a temporary restraining order was issued, together with an order to show cause why defendants should not be restrained from negotiating said bonds and paying said warrants during the pendency of the action. At the hearing of the order to show cause the defendants filed a number of affidavits setting forth the importance of the object of the proposed expenditure to the business interests of the city of Devils Lake. The court made an order that the temporary restraining order theretofore issued be continued until the final determination of the action. From this order the defendants appeal.

We are of opinion that the trial court did not err in refusing to vacate the restraining order. The question involved is one entirely of corporate power. The facts are not in dispute. From the statement of facts prefixed to appellant's brief, it appears that the so-called Pelican Point Bridge is situated in Lake township, between four and five miles southwest of, and outside of the corporate limits of, the city of Devils Lake, and consists of an embankment of earth and stone, connecting the north and south shores of Devils Lake at its narrowest point. In the center, where the water is deepest, there is a pontoon bridge or barge, about 100 feet in length, connecting the embankments. The affidavits show that the construction of the so-called bridge was commenced in the spring of 1900 by the business men of the city of Devils Lake, acting through a citizens' committee, and that a large sum of

money was raised by private subscription and expended upon its construction. The land on the north side of the lake belongs to the state military reservation, and by chapter 134, p. 173, Laws 1901, the legislature granted the right to locate a highway thereon, and a highway was located by the township of Lake, in which said military reservation is situated, connecting the embankments with the public highways leading to the city of Devils Lake. The land on the south side is included in the Ft. Totten Indian reservation. The affidavits state that the city of Devils Lake acquired a right of way over the tract of land abutting on the south side from the allottee Indian owning the same, with the consent of the United States government. The road, as constructed by the citizens' committee, aside from the pontoon bridge in the center, extended about three feet above the surface of the water. Since 1901 the waters of Devils Lake have risen about thirty-eight inches, necessitating the raising of the embankments. Some \$12,000 have been expended. The expenditures now proposed are necessary to put the road in permanent and safe condition. The affidavits filed by the defendants show that there is a large territory south of the city of Devils Lake, and a large number of people tributary, who will do their trading at that city if the bridge is constructed and maintained; that "the amount of increased trade and business brought to the city of Devils Lake during the time said highway was passable in the summer of 1901 * * * aggregated an average of approximately two hundred fifty dollars a day; that said increased business was general in character, and a direct benefit to all engaged in business in said city of Devils Lake at said time." The affidavits also show that there are more than 1,000 allottee Indians residing on the Ft. Totten Indian reservation, on the south side of the lake, who are largely engaged in agricultural pursuits, and who will do their trading at the city of Devils Lake, providing the highway in question is maintained; that there are a large number of persons in "the Cheyenne River country" who are "naturally tributary to the city of Devils Lake," and who would "market their wood and purchase their supplies at Devils Lake if the bridge were maintained;" that there are a large number of instructors in the industrial school on the Indian reservation; that said school consumes a vast amount of all kinds of merchandise and supplies, a large portion of which would be purchased at said city if said highway is opened for travel; that there is

approximately 100,000 acres of unoccupied and unallotted land on the Indian reservation, which it is proposed to open to settlers, and that this, when occupied and cultivated, will increase the commercial importance of the city of Devils Lake if said highway is maintained; that the completion and maintenance of said highway communicating with the land south of Devils Lake "will greatly increase the amount of marketing and trading done at said city of Devils Lake, and otherwise greatly improve and extend its commercial relations." It is also stated that "the construction, completion and maintenance of said highway known as 'Pelican Point Bridge' is a commercial necessity to said city, and that it will greatly extend the commercial importance and trade relations of the said city; that it will greatly increase the amount of grain marketed in said city, and very materially increase and extend the territory tributary to the said city of Devils Lake, and will be a direct benefit, to a very appreciable extent, to every merchant, property owner, taxpayer and resident of said city."

There are two sufficient reasons why the proposed expenditure is illegal. It must be conceded that the validity of the bonds and warrants in question cannot be sustained unless the city has power to provide for their payment by taxation. It has been properly said that "the issue of bonds by a city, whatever provision may be made for their redemption, involves the possible, and not improbable, consequence of the necessity to provide for their payment by the city. The right to incur the obligation implies the right to raise money by taxation for payment of the bonds, or, what is equivalent, the right to levy a tax for the purposes for which the fund is to be raised by means of the bonds so authorized." *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39. The validity of a contract of a municipal corporation which can only be fulfilled by resort to taxation depends on the power to levy a tax for that purpose. *Savings & Loan Ass'n v. Topeka*, 20 Wall. 655, 87 U. S. 655, 22 L. Ed. 455; *Sharpless v. Mayor*, 21 Pa. 147, 167, 59 Am. Dec. 759; *Hanson v. Vernon*, 27 Iowa, 28, 1 Am. Rep. 215; *Allen v. Inhab. of J.*, 60 Me. 127, 11 Am. Rep. 185; *Whiting v. Fond du Lac*, 25 Wis. 188, 3 Am. Rep. 30. It is proposed to expend funds derived from a sale of these bonds upon a road or bridge which is not a legal highway. Such an expenditure will not authorize the imposition of a tax. "It has been decided that an assessment for making and opening a road, where no road has in fact

been laid out, and where consequently the land is the subject of private ownership, and no highway would exist when the money was expended, would be illegal and void." 1 Cooley on Tax'n (3d Ed.) 216; *Philbrook v. Kennebec*, 17 Me. 196; *People v. Saginaw Supervisors*, 26 Mich. 22; *Pacific Bridge Co. v. Kirkham*, 54 Cal. 558; *Snyder v. Foster*, 77 Iowa 638, 42 N. W. 506. See, also, *Coates v. Campbell*, 37 Minn. 498, 35 N. W. 366. Bridges constitute a part of the public highway. Section 1091, Rev. Codes. Section 1053, Rev. Codes, which is a part of chapter 17 of the Political Code of 1899, commits the power to open highways outside of the limits of incorporated cities, villages or towns, "all proceedings relative thereto," and "all matters connected therewith," to the board of county commissioners or board of township supervisors. Section 1114, Rev. Codes 1899, charges township supervisors with the care and supervision of roads and bridges within their respective townships. It is not claimed that the county commissioners of Ramsey county, or the supervisors of Lake township, in which the "bridge" is situated, have taken any action whatever either to locate it or recognize it as a highway. It has not acquired a legal character as a public highway by use, under section 1050, Rev. Codes 1899, and there is no pretence that it was laid out and established as a highway under chapter 17, of the Political Code of 1899. On the contrary, it was constructed, as we have seen, by private individuals and by private subscription. The duty of maintaining and keeping in repair a public highway, regularly established (that is, a legal highway), may be enforced, and the public interests thereby protected. See 2 Cooley on Tax'n (3d Ed.) 1293, and cases cited. The construction of this road imposed no such obligation upon the individuals who constructed it, or upon the county or township in which it is situated. In short, there exists no duty to maintain and keep it in repair which the public can enforce. *Travis v. Skinner*, 72 Mich. 152, 40 N. W. 234; *Anthony v. Inhab. of Adams*, 42 Mass. 284; *City of Goshen v. Myers*, 119 Ind. 196, 21 N. E. 657; *Board v. Township*, 121 Ind. 379, 23 N. E. 257; *Houfe v. Town*, 34 Wis. 608, 17 Am. Rep. 463; *State v. Supervisors*, 41 Wis. 28. If, therefore, no other objection existed than that just considered, it alone would be sufficient to render the proposed expenditure illegal.

But aside from the fact that it is proposed to expend funds derived by local taxation upon a bridge which is not located upon a

legal highway, the proposed expenditure is illegal for another reason. It is not for a corporate use or purpose, but is, on the contrary, for private benefit. The doctrine of the cases on this point is stated in 2 Dillon on Munic. Corp. (4th Ed.) section 736 (587), as follows: "The taxing power of the state consists in its authority to levy and collect taxes and assessments, which are in the nature of special taxes. Taxes (including in the term assessments) are burdens or charges imposed by the legislature, or under its authority, upon persons and property, to raise money for public, as distinguished from private purposes, or to accomplish some end or object public in its nature. There can be no legitimate taxation to raise money, unless it be destined for the uses and benefit of the government, or some of its municipalities or divisions invested with the power of auxiliary or local administration. A public use or purpose is of the essence of the tax." Again, it is said in 2 Beach on Pub. Corp., section 1440, that "municipal taxation must be for local purposes only, and for a public use, and the rule of strict construction should always be applied." The development of the commerce or trade of a city is not a corporate purpose. Instances are numerous where cities have attempted to promote their commercial importance by aiding manufacturing and industrial enterprises through the aid of local taxation, and in every instance the attempted exercise of power, when called in question, has been condemned as unlawful. To bring any particular object within the description of a corporate purpose, "it must appear to be money necessary to the execution of some corporate power, the enjoyment of some corporate right, or the performance of some corporate duty, as established by law or by long usage." *Spaulding v. Lowell*, 40 Mass. 71. "Municipal corporations possess only a limited right to bind themselves and the inhabitants and property within their respective limits by civil contracts. Their contracts will be valid when made in relation to objects concerning which they have a duty to perform, an interest to protect, and a right to defend; but here is the extent at once of their right and their power. They cannot engage in enterprises foreign to the purpose for which they were incorporated, nor assume responsibilities which involve undertakings not within the compass of their corporate powers." *Vincent v. Inhab. of Nantucket*, 66 Mass. 103. Neither will they be bound by the express vote of the majority to the performance of contracts or other legal duties not coming within the scope of the

objects and purposes for which they are incorporated. *Anthony v. Adams*, 1 Metc. (Mass.) 284. In *Ottawa v. Cary*, 108 U. S. 110, 2 Sup. Ct. 361, 27 L. Ed. 669, it was said that the power to govern a city does not imply power to expend the public money to make the water in the rivers available for manufacturing purposes. "The charter confers all the powers usually granted to a city for the purposes of local government, but that has never been supposed, of itself, to authorize taxes for everything which, in the opinion of the city authorities, would promote the general prosperity and welfare of the municipality. Undoubtedly, development of the water power of the streams that traverse the city would add to the commerce and growth of the citizens. But certainly power to govern the city does not imply power to expend the public money to make the water in the rivers available for manufacturing purposes. * * *" In 1 *Cooley on Tax'n* (3d Ed.) 206, it is said that: "However important it may be to the community that individual citizens should prosper in their industrial enterprises, it is not the business of government to aid them with its means. Enlightened states, while giving all necessary protection to their citizens, will leave every man to depend for his success and prosperity in business on his own exertions, in the belief that by doing so his own industry will be more certainly enlisted, and his prosperity and happiness more probably secured. It may therefore be safely asserted that taxation for the purpose of raising money from the public, to be given or even loaned to private persons, in order that they may use it in their individual business enterprises, is not recognized as an employment of the power for a public use. In contemplation of law, it would be taking the common property of the whole community and handing it over to private parties for their private gain, and consequently unlawful. Any incidental benefits to the public that might flow from it could not support it as legitimate taxation." See, also, cases cited at note 1.

It may be safely stated that no case can be found sustaining an expenditure by a city, as for a corporate use and purpose, when the principal object of the expenditure is to promote the trade and business interests of the city, and the benefit to the inhabitants is merely indirect and incidental. The cases condemning such efforts are almost numberless. In 1872 the business and manufacturing district of Boston was destroyed by fire. The legis-

lature of Massachusetts, called in special session for that purpose, passed an act authorizing the city of Boston to issue bonds to the amount of \$20,000,000 to render aid in the way of loans in rebuilding the burned district. In a well-reasoned opinion, the soundness of which has never been questioned, but always approved, the Supreme Court of that state held that the proposed expenditure was not for a public use or purpose, and would not sustain the power of taxation, and that the act was unconstitutional and void. We quote at length from the very lucid opinion in that case: "The power to levy taxes is founded on the right, duty and responsibility to maintain and administer all the governmental functions of the state, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private, and not a public, object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public or to the state which results from the promotion of private interests and the prosperity of private enterprises or business does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion.

* * * The power of the government, thus constituted, to affect the individual in his private rights of property, whether by exacting contributions to the general means, or by sequestration of specific property, is confined, by obvious implication as well as by express terms, to purposes and objects alone which the government was established to promote, to wit, public uses and the public service. This power, when exercised in one form, is taxation; in the other, is designated as the right of eminent domain. The two are diverse in respect of the occasion and mode of exercise, but identical in their source, to wit, the necessities of

organized society, and in the end by which alone the exercise of either can be justified, to wit, some public service or use. It is due to their identity in these respects that the two powers, otherwise so unlike, are associated together in the same article. So far as it concerns the question what constitutes public use or service that will justify the exercise of these sovereign powers over private rights of property, which is the main question now to be solved, this identity renders it unnecessary to distinguish between the two forms of exercise, as the same tests must apply to and control in each. An appropriation of money raised by taxation, or of property taken by right of eminent domain, by way of gift to an individual for his own private uses exclusively, would clearly be an excess of legislative power. The individual, by reason of his capacity, enterprise or situation, might be enabled to employ the money or property thus conferred upon him in such a manner as to furnish employment to great numbers of the community, to give a needed impulse to business of various kinds, and thus promote the general prosperity and welfare. In this view, it might be shown to be for the public good to take from the unenterprising and thriftless their unemployed capital, and intrust it to others who will use it to better advantage for the interests of the community. But it needs no argument to show that such an arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken, and an unjustifiable usurpation." See, also, *Whiting v. Sheboygan R. Co.*, 25 Wis. 167, 3 Am. Rep. 30; 1 *Dillon on Munic. Corp.* (4th Ed.) section 159, and cases cited; also *State v. Township of Osawkee*, 14 Kan. 419, 19 Am. Rep. 99; *Central Branch U. P. R. Co. v. Smith*, 23 Kan. 745; *Clark v. City of Des Moines*, 19 Iowa 199, 87 Am. Dec. 423; and particularly *Town v. Watson et al.*, 33 Ark. 704.

The facts of this case bring it within the principle of the cases to which we have just referred. The proposed expenditure is not for a bridge upon the streets of the city, nor at or near its boundaries, for the convenience of its inhabitants. On the contrary, the "bridge" in question is almost five miles from the city limits, and is neither a necessity, nor even a convenience, to the inhabitants of the city for traveling purposes. Its utility and avowed purpose is to provide the inhabitants of an outlying and remote district lying south of the lake with a convenient mode of reaching

the city of Devils Lake to do their trading, and thereby increase the trade of the merchants and business men of the city. The direct purpose of the expenditure is for the benefit of those who will travel the road, and the business men who will profit by their trade. The benefit which will accrue to the inhabitants of the city is merely incidental and indirect. As has already been pointed out, such benefits do not constitute a public purpose for which a tax may be imposed. The expenditure is essentially for a private purpose. For this reason, and independent of all other consideration, the bonds in question are unauthorized and void.

In reaching this conclusion, we do not unqualifiedly assent to the contention of plaintiff's counsel that the boundaries of a city mark the limits of the lawful exercise of its corporate power, and that there can be no expenditure for a corporate purpose, the object of which is located outside of its boundaries. For obvious reasons, the exercise of its political and governmental powers is restricted by its boundaries. But in the exercise of other corporate functions, which affect the health, safety and convenience of its inhabitants, and may be said to be of a private nature, the reason for the limitation which rests upon the exercise of its governmental and political power does not exist. For this reason it has been generally held that a city can expend corporate funds for parks, drains, sewers, waterworks, breakwaters, pesthouses and cemeteries. It has also been held that they may construct bridges at or immediately outside of their boundaries, when necessary to serve the convenience of their inhabitants. Such was the holding in the Brooklyn Bridge Case (*People v. Kelly*, 76 N. Y. 475), and for the same reasons the right has been sustained in numerous other cases. The power of a city corporation to exercise functions of a private nature outside of its limits is recognized to some extent by the statute in enumerating the powers of city councils. See subdivisions 7 and 60, section 2148, and section 2503, Rev. Codes 1899. But as already stated, the "bridge" here in question cannot be said to be a convenience to the inhabitants of the city of Devils Lake. The proposed expenditure cannot, therefore, be sustained as for a corporate purpose.

The order appealed from will be affirmed. All concur.

(99 N. W. 51.)

THE STATE OF NORTH DAKOTA, EX REL GEORGE D. KELLY AS STATE'S ATTORNEY IN AND FOR NELSON COUNTY, NORTH DAKOTA, VS. ALLAN McMASTER, AND ALLAN McMASTER AND J. M. C. McMASTER, COPARTNERS AS ALLAN McMASTER & Co., AND THE LAKOTA TOWNSITE AND IMPROVEMENT Co., A CORPORATION.

Opinion filed January 21, 1904.

Abatement of Action — Death of Party — Survival — Liquor Nuisance — Appearance — Effect — Waiver — Descent and Distribution — Destruction of Liquors.

In an action brought by the state on the relation of a state's attorney for the relief provided for by section 7605, Rev. Codes 1899, against a party defendant, and against said party and another as a copartnership, and against the owner of the premises for maintaining an alleged nuisance contrary to the provisions of said section, the person sued and served individually died after issue joined and before trial. No service was obtained upon the other party alleged to be a member of the partnership, nor did he appear or answer before trial. On the trial he appeared by attorney in court, and participated in the trial upon the issues raised by the answers filed by the other defendants, which placed in issue the question of partnership, but no answer was served by or for him. *Held:*

1. That the action abated by the death of said party and that the cause of action did not survive.

2. That by an appearance at the trial and participating in the trial upon the issues raised the other party, not served with summons and other papers, did not admit by such appearance without answer that he was a member of the partnership, under the proceedings as shown by this record.

3. By litigating the question whether such person was a member of the partnership, without claiming at the trial that such appearance was an admission of an existing partnership, the right to claim that such partnership was admitted was waived by the state, and could in no event be raised for the first time in this court.

4. The action having abated by the death of the principal defendant, and no proof of partnership having been produced on the trial, the action did not survive, but abated as against the decedent, and his personal representative could not be made a party, as the action is a public one, based on the individual and personal acts of decedent in violation of said section.

5. Upon the death of said defendant the property used by him in the maintenance of the nuisance passed to his heirs, subject to the control of the county court.

6. Before intoxicating liquors can be rightfully destroyed pursuant to said section, the nuisance must be shown to have been maintained by some person as a defendant and owner or keeper in a pending action.

7. No proceeding in rem alone against the liquors kept is authorized under said section 7605, but such liquors can only be destroyed in an action against the owner or keeper guilty of unlawfully keeping or using such liquors.

8. In this state chapter 63 of the Laws of this state recognizes intoxicating liquors as property that may have legitimate use.

9. The action having abated as to the principal defendant, and the cause of action not having survived, judgment cannot be rendered for the destruction of the property alleged to have been unlawfully used, nor for the closing of the place, as such remedies are incidental to the main remedy, the abatement of the nuisance, which was abated by defendant's death.

Appeal from District Court, Nelson county; *Kneeshaw*, J.

Action by the state, on the relation of George D. Kelly, state's attorney, against Allan McMaster and others. Judgment for defendants, and the state appeals.

Modified.

C. N. Frich, Attorney General, *George D. Kelly*, State's Attorney, and *J. H. Bosard*, Assistant Attorney General, for the appellant.

The defendant J. M. C. McMaster appearing generally by Geo. A. Bangs, his attorney, and failing to file any answer or deny the allegations of the complaint, admits its allegations, among others that J. M. C. McMaster and Allan McMaster were running the drug store against which this action was brought, and wherein it was alleged that a liquor nuisance was conducted under the firm name of Allan McMaster & Company, and admit all other allegations of the complaint which refer to J. M. C. McMaster.

All material allegations of new matter in an answer are admitted if no reply is made to them. *National Lumber Co. v. Ashby*, 59 N. W. 913; *Davis v. First National Bank of Grinnell*, 77 N. W. 775.

Under the allegations of the complaint it is not necessary for plaintiff to introduce evidence. *Bloomer v. Glendy*, 30 N. W. 486; *Peisch v. Linder et al.*, 33 N. W. 133.

In all states having the code pleading all allegations of the complaint not denied are deemed to be admitted for the purpose of the action. *Bonnell v. Jacobs*, 36 Wis. 59; *Dillon v. Russell*, 5 Neb. 488; *Breckenridge v. American Cent. Ins. Co.*, 87 Mo. 62.

The action does not abate; it is an action in equity for an injunction against the premises which are being maintained as a nuisance; the injunction was issued and served and the premises closed prior to the death of the defendant; the action was against a copartnership and the owner of the premises; one of the partners only has died; a decree was issued against the surviving member as well as it could in the lifetime of his partner for the closing of the building, taxing of costs and the destruction of the liquors, etc., seized in the action. The death of a party to a suit in chancery, if the cause survives to or against some of the parties, so that a perfect decree as to every part of the subject of the litigation can be made between the survivors, the suit does not abate; the court will order it to proceed between the survivors. *Leggett v. Dubois*, 2 Paige 211; *Fisher v. Rutherford*, 1 Baldwin C. C. Rep. 192; *Hess v. Lowery*, 7 L. R. A. 90; *Robinson v. Bank of Pikeville*, 56 S. W. 660; *King v. Bell*, 14 N. W. 141; 24 Federal Dec. 251; *Troy Iron & Nail Factory v. Winslow*, 11 Blach. 513; *Geyer v. Douglas (Iowa)*, 52 N. W. 111; *Pingree v. Coffin*, 78 Mass. 289.

The presumption under section 2427, Rev. Codes, from the fact that intoxicating liquor was found on the premises and that it was kept for sale is not overcome by proof that the owner thereof did not keep it, but it must be shown that no one kept it for that purpose. *State v. Intoxicating Liquors*, 80 N. W. 230.

If it appear that the liquor when seized was kept by any person, whether defendant or not, for the purpose of being illegally sold, judgment of forfeiture is to be rendered. *State v. Intoxicating Liquors*, 80 N. W. 230.

The death of one of several defendants does not abate the action as to the others. *Brown v. Andrews*, 1 Barb. 227; *Gardner v. Walker*, 22 How. Pr. 405.

The owners of intoxicating liquors seized are not entitled to their release or value if found by a search made by authority of a warrant issued for the purpose, whether such search was unlawful or not. *Ferguson v. Josey et al.*, 66 S. W. 345; *Elmore v. State*, 45 Ark. 243; *Ry. Co. v. Gans*, 62 S. W. 738.

Fred A. Kelley and Geo. A. Bangs, for respondent.

The record discloses no notice on the part of the state that it intended to claim a default against J. M. C. McMaster. Questions not raised in the trial court will not be noticed on appeal even by a stipulation of counsel. 2 Cyc. Law & Proc. 660, and cases cited; *Pielke v. Railway*, 6 Dakota 444, 43 N. W. 813; *Parrish v. Mahany*, 12 S. D. 278, 81 N. W. 295; *Marshall v. Andrews*, 8 N. D. 364, 79 N. W. 851; *Purcell v. St. Paul Fire & Marine Ins. Co.*, 64 N. W. 943; *Q. W. Loverin-Browne Co. v. Bank of Buffalo*, 7 N. D. 569, 75 N. W. 923; *Baumer v. French*, 8 N. D. 319, 79 N. W. 340; *Fletcher v. Nelson*, 6 N. D. 94, 69 N. W. 53; *Little v. Little*, 2 N. D. 175, 49 N. W. 736; *Braithwaite v. Power et al.*, 1 N. D. 455, 48 N. W. 354.

J. M. C. McMaster may take advantage of the defense introduced by the other defendants. The defense which goes to the validity of the plaintiff's cause of action though interposed by but one defendant, would inure to the benefit of all, even those in default. 1 Enc. Pl. & Pr. 861; *Sutherlin v. Mullis*, 17 Ind. 19; *Strapp, admr. v. Davis, admr.*, 78 Ind. 128; *Miller v. Longacre*, 26 Ohio State, 291; *Williams v. McGrade*, 13 Minn. 40; *Blodgett v. Morris*, 14 N. Y. 482; sections 5261, 5481 and 5413, Rev. Codes 1899.

The action although termed equitable is nevertheless a public action brought for the purpose of vindicating a public right, for the purpose of preventing in the future, violation of the prohibition law, and is therefore a public action. 1 Cyc. Law & Proc. 49; *Littleton v. Fritz*, 65 Iowa 495, 22 N. W. 641; *Applegate v. Winebrenner*, 66 Iowa 68, 23 N. W. 267; *Geyer v. Douglass*, 52 N. W. 111; *Beebe v. Wilkins*, 29 Atl. 693; *Johnson v. Elwood*, 82 N. Y. 362.

Pending the final disposition of the cause, the court had authority under its equitable powers, to consider a motion by the defendant to oust the sheriff of possession. *State v. McGruer*, 9 N. D. 566, 84 N. W. 363.

The closing of the premises, destruction of the liquor and taxation of costs are incidental to the final judgment. In *re Kaeppler*, 7 N. D. 307, 75 N. W. 253, and cases cited.

MORGAN, J. This action was commenced on March 5, 1903, against Allan McMaster, Allan McMaster and J. M. C. McMaster,

copartners as Allan McMaster & Co., and the Lakota Townsite & Improvement Company. The action is brought by the state of North Dakota, on the relation of George D. Kelly, as state's attorney of Nelson county, N. D. The action was commenced by the issuance and service of a summons, complaint, search warrant and injunctive order. Personal service of these papers was made on Allan McMaster and the Lakota Townsite & Improvement Company. The latter was made a defendant as the owner of the premises involved in the action. The complaint alleges on information and belief that Allan McMaster and J. M. C. McMaster are copartners doing business as Allan McMaster & Co.; that the defendants Allan McMaster and Allan McMaster & Co., use and occupy the premises in violation of chapter 63 of the Penal Code, and maintain a nuisance in a place kept on said premises in violation of section 7605, Rev. Codes 1899, and kept thereon a place where intoxicating liquors are unlawfully sold, contrary to the provisions of said section. The relief prayed for is that said place be declared a nuisance, said nuisance abated, the place closed, and the defendants permanently enjoined from keeping said place as a nuisance and from selling intoxicating liquors thereon unlawfully; also a prayer for general relief, with costs and attorney's fees. An affidavit was also filed showing violations of said law. A search warrant was asked for and issued, and upon search being made large quantities of intoxicating liquors were found on the premises, a drug store. Allan McMaster and the townsite and improvement company appeared and answered, denying the partnership, and denying the maintenance of a nuisance on the premises described. J. M. C. McMaster was not made a party to the action when commenced, and was not served with the summons or other papers. At the time of issuing the papers in the injunction suit Allan McMaster was arrested under criminal proceedings based on violations of said section 7605, and bound over to the district court after a preliminary hearing. Prior to the term of the district court following the institution of these civil and criminal actions Allan McMaster died. At the May term, 1903, of the district court of Nelson county, the district court adjudged that the criminal action against Allan McMaster had abated, and ordered the criminal actions stricken from the calendar, but the civil action, involving the injunctive proceedings, was retained on the calendar for future action. At said May term, and on

June 29, 1903, the civil action being on the calendar for trial, the following proceedings were taken therein: The attorney of record for Allan McMaster, upon being asked by plaintiff's attorney to state for whom he now appeared in the action, replied that he appeared for the townsite company and for J. M. C. McMaster. Plaintiff's attorney then suggested that J. M. C. McMaster had been appointed administrator of the estate of Allan McMaster, and asked that said J. M. C. McMaster be brought upon the record as the personal representative of Allan McMaster, deceased. The attorney for J. M. C. McMaster opposed such action by the court on the ground that the action was public in its character, and did not survive the death of Allan McMaster, but, on the contrary, abated upon his death. The court denied the motion. Thereupon the state offered testimony to establish the fact that a nuisance was maintained by Allan McMaster in the place described in the complaint by the unlawful sale of intoxicating liquors therein, and to establish the fact that J. M. C. McMaster and Allan McMaster were copartners, and, as such maintained such nuisance. At the close of taking such testimony the defendants moved for judgment in their favor on the ground that plaintiff had failed to establish any copartnership as alleged in the complaint, and had failed to show that J. M. C. McMaster was in any way connected with the unlawful sale or keeping for sale of intoxicating liquors, as alleged in the complaint, or in any other manner. The motion was granted, and the action was dismissed, with costs to be taxed against the plaintiff. Plaintiff has appealed from the judgment of dismissal, and a trial de novo is requested under the provisions of section 5630, Rev. Codes 1899.

The appellant first contends that the unconditional appearance of J. M. C. McMaster and his failure to answer was an admission by him that he was a partner with Allan McMaster, as charged in the complaint, and that such appearance rendered proof of the partnership unnecessary, and that judgment should have been entered adjudging the place in question a nuisance kept by such partnership. The record will not sustain this contention. The record shows that the trial proceeded upon the theory that J. M. C. McMaster disclaimed any partnership. That was one of the questions upon which evidence was introduced by the plaintiff. The appearance of J. M. C. McMaster gave the court jurisdiction over his person, and accomplished the same purpose, and no more,

than had he only appeared in the action and demanded a copy of the summons and complaint before service upon him of them, or had he simply been served with these papers by the sheriff when the action was commenced. Before the taking of testimony commenced, defendants' counsel stated, while reviewing the prior proceedings had in the case before the court: "Of course, if they desire to combat the issue and try to show that whether or not there was a copartnership and that copartnership was engaged in the illegal business, we are ready to dispose of that issue after we dispose of the Allan McMaster issue in the case." Pending the argument upon the disposition to be made of plaintiff's motion to substitute the administrator of Allan McMaster's estate as a defendant, the court inquired of plaintiff's counsel: "What about the other matter? Do you make any contention of partnership?" Plaintiff's attorney replied, "Yes." Thereupon the court said, "Well, proceed." Whereupon the court ruled that the action had abated as to Allan McMaster, and denied the motion to substitute his administrator as a party defendant. The testimony was then taken upon all the issues raised by the answer in the case, including the one as to the existence of the alleged partnership of Allan McMaster & Co. So far as the trial proceeded without an answer by J. M. C. McMaster, it proceeded irregularly. But the answer of Allan McMaster and the answer of the townsite company denying the existence of any copartnership were still in the case. The attitude of the attorneys on each side seemed to be that the issue of partnership would be tried under the pleadings then in the case. This was done without objection on either side. Nowhere in the record is it suggested by objection or otherwise that J. M. C. McMaster was in default by virtue of having not interposed an answer. Nowhere in the court below did plaintiff's attorney move for judgment against J. M. C. McMaster on this ground. The issue of partnership was litigated by consent without an answer by this defendant. The question of the default of J. M. C. McMaster, if such did exist, cannot be raised for the first time in this court under the facts as shown by the record in this case. *Power v. Bowdle*, 3 N. D. 107, 54 N. W. 404, 21 L. R. A. 328, 44 Am. St. Rep. 511, and cases there cited.

It is next contended that the action is an equitable one in the nature of an action in rem brought to abate a nuisance by closing the premises and destroying the liquors found, and to enjoin the continuance of the nuisance, and does not abate entirely by reason

of the death of Allan McMaster. The record shows that Allan McMaster alone committed all the acts constituting the nuisance. No sales are attempted to be shown as made by any one other than himself. There is no proof or attempt to prove that J. M. C. McMaster committed directly any of the acts complained of. Nor is there any evidence in the record showing, or even tending to show, that he was interested in the alleged firm of Allan McMaster & Co. as a partner, nor does the proof show any partnership. The trial court held that both civil and criminal proceedings abated upon his death. So far as the civil proceedings are concerned, the state contends that the action of the trial court was erroneous in holding that the civil action had abated. The state claims that a decree can now issue against J. M. C. McMaster as a surviving member of the partnership. This position might be tenable if it had been shown that J. M. C. McMaster was a member of the copartnership. As we have seen, he is not shown to have been connected with the alleged partnership by any evidence, and his appearance in the action was, under the circumstances, not an admission of the allegation of partnership contained in the complaint. Hence it seems clear that the court had no jurisdiction over the action by virtue of the appearance of J. M. C. McMaster in the action, after Allan McMaster died. Hence this question must be determined upon other principles than the one advanced that it may be passed to a final decree by virtue of J. M. C. McMaster's appearance in the case as a surviving partner of the firm. None of the numerous cases cited by appellant on this phase of the appeal is in point. Such cases are cited in support of this principle, as stated in appellant's brief: "It is a well-established rule, adopted by all states which have adopted the code pleading, that all material allegations of the bill or complaint which are not denied by the answer are deemed to be admitted for the purpose of the action." This will be admitted as stating a sound principle of the law of pleading. But, as shown, such principle is not applicable here.

The state next contends that the action did not abate at Allan McMaster's death, but survived by reason of the fact that personal service was made upon him, liquors seized in his possession unlawfully, and the place lawfully closed by due process of law prior to his death, and that the action can proceed to judgment against the intoxicating liquors unlawfully kept in the place as a proceeding in rem. Did the action abate entirely upon the death of Allan Mc-

Master, or does it survive to the extent that judgment may be entered for the closing of the premises and the destruction of the liquors seized? Section 5234, Rev. Codes 1899, provides: "No action shall abate by the death * * * of a party * * * if the cause of action survives." The test to determine whether an action has abated is whether the cause of action continues. The cause of action in this case is based upon a violation of section 7605, Rev. Codes 1899. The action is brought by the state. It is brought to enforce the penalties provided by said section for violations of its provisions. That section authorizes a judgment or decree (1) declaring a place where intoxicating liquors are unlawfully kept or sold a nuisance; (2) ordering such place abated and shut up by taking possession thereof and all intoxicating liquors found therein, and said intoxicating liquors destroyed; (3) a permanent injunction against the maintenance of the nuisance. The remedy sought in this and similar actions is to secure the enforcement of a general law of the state by the enforcement of civil penalties. The violation of the law under which the action is brought concerns the public at large, and not any citizen in his individual capacity as plaintiff. This action was brought on behalf of the public to prevent violations of this law by Allan McMaster. No contract right is involved in the suit, and no property rights accrue to the plaintiff by virtue of the action. The action is therefore a public one so far as its maintenance is concerned, as well as in the objects sought by its prosecution. Such actions are deemed public actions under similar statutory provisions. In *Applegate v. Winebrenner*, 66 Iowa, 68, 23 N. W. 268, the court said: "The act of 1884 provides that a suit may be maintained by any citizen of the county for the abatement of the nuisance such as defendant is charged with maintaining, and that an injunction may be issued in the proceedings. The action, although prosecuted in the name of a private party, is for the public benefit; that is, the injury which is sought to be remedied by the proceeding is an injury to the general public, rather than to the individual citizen." In *Littleton v. Fritz*, 65 Iowa, 496, 22 N. W. 645, 54 Am. Rep. 19, the court said: "The plaintiff is by law made the representative of the public in bringing and maintaining the action." In *Geyer v. Douglass*, 85 Iowa, 93, 52 N. W. 111, it was said, in speaking of a statute similar to section 7605, Rev. Codes 1899: "In either case, however, the action so instituted is of a public nature and for the public benefit." The action is therefore one

providing for the protection of the rights of the public. So far as the defendants are concerned, the law in question provides a civil remedy for its enforcement as well as a remedy by conviction of a criminal offense therein defined—that of maintaining a nuisance. It also aims to prohibit by injunction the criminal acts constituting the nuisance, and provides additional penalties to insure the abatement of the nuisance, the destruction of the liquors and personal property used in maintaining the nuisance, and the closing up of the premises for one year. These are all based on the personal acts of the person maintaining the nuisance. Their object is to stop the violation of the law. That object is effectually accomplished without the aid of the remedies afforded by the law when the person maintaining the nuisance dies. The nuisance is abated by his death, and nothing further can be effectuated by proceeding with the action to judgment. The state is not seeking anything beyond the effectual abatement of the nuisance. The prescribed remedies of closing the building and destroying the liquors are afforded alone to further the one object. The death of Allan McMaster has resulted in conclusively doing so, and nothing further can be accomplished by further proceedings. The action has abated by his death and the cause of action did not survive against his administrator. The case of *Johnson v. Elwood*, 82 N. Y. 362, is as near in point as any case cited. In that case the court said: "The plaintiff claims that no order of reference could be made in this case for the reason that the action abated in consequence of the death of the defendant before any trial, and that the cause of action did not survive. It is evident that, if the plaintiff had succeeded in maintaining a right to the injunctive order after the defendant's death, no judgment could have been entered against the defendant; nor is it apparent in what manner his representatives could have been restrained in this action. The acts of the defendant in interfering with the lots in question were of a character purely personal to himself, and the restraint upon him by injunction was at an end upon his decease and the maxim, '*Actio personalis moritur cum persona*,' applies. As the action became abated and did not survive upon the death of the defendant against his heirs or representatives, there was no authority in the court to direct its discontinuance, or to make any other order than that it be deemed abated by such death." See, also, *Geyer v. Douglass*, 85 Iowa, 93, 52 N. W. 111; *Beebe v. Wilkin* (N. H.), 29 Atl. 693; *State v. Batchellor* (N. H.) 20 Atl. 931.

It is strenuously insisted that the court had jurisdiction to continue the action to judgment as against the liquors and other personal property seized by the sheriff upon a search of the premises under a warrant of the court directing him to do so. It is claimed that these goods are shown by the proof to have been used in the maintenance of the nuisance and should be destroyed, although the action abated so far as Allan McMaster is concerned. Admitting that the proofs show that the liquors and property seized were unlawfully used by Allan McMaster, it does not follow that the court has power to now order their destruction. It is shown by the evidence that Allan McMaster alone was engaged in the unlawful use of these premises. No partnership is established and J. M. C. McMaster is not shown to have been in any way connected with the maintenance of the nuisance or in the partnership. The destruction of this personal property is ordered in order that the nuisance may be abated. Section 7605, Rev. Codes 1899, provides: "And if the existence of such nuisance is established either in a criminal or equitable action, upon the judgment of a court or judge having jurisdiction, finding such place to be a nuisance, the sheriff * * * shall be directed to shut up and abate such place, * * * and such personal property * * * shall, after judgment, be forthwith publicly destroyed by such officer." Before such a decree could be entered—that is, before the place was established to be a nuisance—the action had abated by the defendant's death. By his death the court lost jurisdiction to proceed, and, unless the cause of action survived, no substitute could be made of his personal representative. No procedure is established by the code for substitution of parties if the action abates and the cause of action does not survive. There is nothing upon which a substituted party can act, as death has discontinued the action and wiped out the cause of action. No proceeding against the liquor alone is provided for. The liquors are ordered destroyed in an action with parties plaintiff and defendant. No proceeding *in rem* is authorized under chapter 63 of the penal code—being the prohibition law of North Dakota. In this respect this law is not the same as some other prohibitory liquor laws, notably that of the state of Iowa. Therefore the case of *State v. Liquor* (Iowa) 80 N. W. 230, relied on by plaintiff's counsel, is not in point. So, also, is the case of *Ferguson v. Josey* (Ark.) 66 S. W. 345, based upon a statute unlike our own in this respect. As said, section 7605, *supra*, prescribes the procedure to be followed

in abating this class of nuisances, and, it not having provided a remedy against the liquors except when found to be unlawfully used by a person, the action cannot be prosecuted to judgment after the death of the person guilty of the violation of the statute. As stated before, the object of the action is the abatement of the nuisance. Closing the building and the destruction of the liquors are provided for to secure this object and are merely incidental to the main object. The ultimate aim of the statute is to provide that no nuisance shall be maintained on the premises described. No punishment is expressly provided for under the civil action, unless the destruction of the liquors be deemed a punishment. If punishment is sought, that is provided for by a criminal proceeding in which the abatement of the nuisance is provided for by closing the building and destroying the liquors and personal property. The closing of the premises is provided for in the criminal action as well as in the civil, and the same remedy is afforded the owner of the premises. In case he has acted in good faith, and upon his furnishing a bond that he will immediately abate the nuisance, the court may order the premises immediately turned over to him. Such owner has this right whether made a party to the civil action or not, and has the same right to have the premises turned over to him after the tenant's commission of the criminal offense. If the law contemplates that one of the main purposes of the judgment is the closing of the premises, it seems strange that such purpose could be annulled on the application of the defendant immediately after the judgment or the ordering of the judgment. No destruction of the liquors can be ordered until the place is adjudged to be a nuisance by a final judgment or order. Before the final order was made, the owner had died, and the title to the liquors and personal property had passed to the heirs subject to the control of the county court and the possession of the administrator. Section 3741, Rev. Codes 1899. Possession of the liquors by a person is not alone sufficient to raise a prima facie presumption that they are unlawfully possessed by such person. Before such possession becomes prima facie evidence of the existence of a nuisance by virtue of possession, under section 7605, Rev. Codes 1899, the liquors must be found in a person's possession under a search warrant based on an affidavit charging the unlawful use or possession of such liquors. Such prima facie presumption would have been available against Allan McMaster, if the case had proceeded to trial on the merits against him. His death

terminated this right. Intoxicating liquors are personal property, capable of lawful use by registered pharmacists for medicinal, mechanical and scientific purposes. The statute provides for such lawful possession by druggists. Section 7594, Rev. Codes 1899. *Brown v. Perkins*, 12 Gray, 89. Inasmuch as no final judgment had been entered or ordered when Allan McMaster died, and upon his death the property passed to his heirs, subject to the control of the county court, no presumption can be indulged in that their use will be for unlawful purposes. If it be now decreed that such property be destroyed, it would be ordering the destruction of property without any proof of its present unlawful use. *State ex rel. Blodgett v. Batchellor* (N. H.) 20 Atl. 931. Upon Allan McMaster's death the action abated and the court had no authority to proceed with the action, or to make any orders therein. It was without jurisdiction. The trial court had no authority to order the property turned over to the administrator. Death abated the action and the court had no authority thereafter to proceed with the action farther than to order that the action be deemed abated. Defendant McMaster is entitled to his costs, as plaintiff endeavored to show, without success, that he was interested as a partner.

So far as the judgment ordered the personal property and liquors seized to be turned over to the administrator, it will be modified. In all other respects the judgment is affirmed. All concur.

(99 N. W. 58.)

THE STATE OF NORTH DAKOTA, EX REL GEORGE M. REGISTER,
STATE'S ATTORNEY FOR BURLEIGH COUNTY V. EDWARD G. PAT-
TERSON, ARTHUR E. MCGAHEY ET AL.

Opinion filed January 23, 1904.

Injunction Against Liquor Nuisance Supported by Affidavit Upon Information and Belief.

1. In an action for the abatement of a liquor nuisance under section 7605, Rev. Codes 1899, an injunction may issue at the commencement of the action upon a complaint alone, when made by the state's attorney and verified by him upon information and belief. This is an exception to the usual rule as to the granting of injunctions.

Search Warrant Issues Only on Affidavit Stating or Showing the Facts.

2. An affidavit for search warrant, setting forth that the party making it is informed and believes that intoxicating liquor, to wit, "whisky, lager beer and other intoxicating liquors, are kept for sale and sold and drank upon certain premises, known as the Northwest Hotel, and described as situated on the corner of Main and Fifth streets, in the city of Bismarck, on the Northern Pacific Railway right of way," is insufficient to give the court jurisdiction to issue a search warrant under section 7605, Rev. Codes 1899, in that the affidavit, being made on information and belief alone, is mere hearsay, and does not state or show the required facts. Following *State v. McGahey*, 97 N. W. 865, 12 N. D. 535.

Appeal from District Court, Burleigh county; *Winchester*, J.

Action by the state, on the relation of George M. Register, state's attorney, against Edward G. Patterson and Arthur E. McGahey. Judgment for plaintiff and defendants appeal.

Reversed in part.

J. G. Hamilton and *A. T. Patterson* and *Tracy R. Bangs*, for appellants.

George M. Register and *F. H. Register*, for respondent.

Briefs substantially the same as in *State ex rel. Register v. McGahey*, 12 N. D. 535, 97 N. W. 865.

COCHRANE, J. This appeal is from an order of the district court of Burleigh county refusing to set aside an injunctional order, and also denying defendants' motion to set aside and vacate a search warrant and to dismiss all proceedings had thereunder in an action for the abatement of a liquor nuisance under section 7605, Rev. Codes 1899. The action has not been tried upon the merits, but is still pending. The complaint was verified by the state's attorney, to the effect that "the same is true to his best knowledge, information and belief." The summons, complaint, injunction, affidavit and search warrant were served upon the defendants at one time. The only affidavit accompanying the papers was attached to the search warrant and was also made by the state's attorney upon information and belief, and without setting up the sources of his information or its substance.

It is urged that the injunctional order is void, because not supported by an affidavit; that the injunction cannot be granted upon the complaint alone, but, if granted upon the complaint alone, the

complaint must be sworn to positively; and that a verification on information and belief will not answer the statutory requirement. In this counsel are mistaken. The statute under which this action is brought permits the injunction to be granted at the commencement of the action in the usual manner of granting injunctions, except that the affidavit or complaint, or both, may be made by the state's attorney, attorney general, or his assistant upon information and belief, and no bond shall be required. Section 7605, Rev. Codes 1899.

The usual manner of granting injunctions at the beginning of the action is prescribed by sections 5343-5345, Rev. Codes 1899. Under this statute, when it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the plaintiff, the injunction may be granted at the commencement of the action; but, when granted on the complaint alone, the facts relied on must be stated, in positive and direct terms, as being within the plaintiff's personal knowledge. Allegations on information and belief are insufficient. The complaint must also be verified positively and not in the usual form of verification. Such is the holding in New York, from which our statute as to procedure in injunction cases is taken. *Roome v. Webb*, 3 How. Prac. 327; *Smith v. Reno*, 6 How. Prac. 124; *Levy v. Ely*, 15 How. Prac. 395; *Hecker v. Mayer*, 28 How. Prac. 211; *Id.*, 18 Abb. Prac. 369; *Woodruff v. Fisher*, 17 Barb. 224; *Bostwick v. Elton*, 25 How. Prac. 362; *Cushing v. Ruslander* (Sup.) 1 N. Y. Supp. 505; sections 603, 604 and 607, *Stover's Code Civ. Proc. N. Y.* And such is the general rule. 10 Enc. Pl. & Pr. 929, and cases cited. Where the averments of the complaint are thus stated and verified, the complaint itself is an affidavit. This usual manner of granting injunctions is varied, in actions to abate liquor nuisances, by the exceptions before mentioned, so that when the affidavit or complaint, or both, is made by the state's attorney, as in this case, it may be made on information and belief. The motion to set aside the injunction was therefore properly overruled.

It is further urged that the search warrant issued in this case and all proceedings thereunder were illegal, and that the trial court erred in refusing to vacate and set the same aside. The state's attorney presented to the court an affidavit, signed and sworn to by

himself, setting forth, on information and belief, that defendants' place of business was at the Northwest Hotel, on the southeast corner of Main and Fifth streets, in the city of Bismarck, in certain basement rooms thereof east of the barber shop and north of the hall running east from near the foot of the stairway leading into said basement. It is unnecessary to set forth this affidavit in full. Its averments are all made on information and belief, without setting forth the source of information or belief, or what the information was. The affidavit is in no way corroborated by other affidavit, deposition or evidence, and the complaint for injunction cannot be looked to to supply the omission in this regard, because it is also made by the state's attorney, and is verified upon information and belief. The district court was without jurisdiction to issue the search warrant upon any such showing. *State v. McGahey* (just decided) 97 N. W. 865.

That part of the order of the district court denying appellants' motion to set aside the search warrant and proceedings thereunder is reversed. In so far as such order denied appellants' motion to dissolve the injunction, it is sustained. Appellants will recover costs. All concur.

ON REHEARING.

(April 12, 1904.)

The petition of the state's attorney of Burleigh county for a rehearing in this case is denied. No point in the opinion is criticised, but he insists that some order should be made as to the disposition of the property seized under the search warrant. This matter is not before us. The motion under review was to set aside the search warrant and all proceedings under it. It did not ask that the property be returned. The warrant under which the sheriff made search and seizure was void. It afforded him no protection. His acts were as if done without any warrant whatever. It cannot be looked to in any sense as a justification for an unlawful seizure or withholding of property. That he dispossessed another of his property unlawfully is patent, but the question whether the beer can be held as evidence against the appellant in the main action, notwithstanding the unlawful means by which the law officer secured its possession, is not for us to determine upon this record.

(99 N. W. 67.)

THE NATIONAL BANK OF COMMERCE V. R. G. PICK.

Opinion filed February 13, 1904.

Notice of Appeal Served on Attorney for Adverse Party.

1. Service of notice of appeal may be made on the adverse party by serving the same upon his attorney who appeared for him on the trial of the action.

Service on Firm of Attorneys, One of Whom is Attorney of Record, Sufficient.

2. Where the notice of appeal was served upon a firm of attorneys who signed the written admission of service thereon in the firm name as attorneys for respondent, and which firm appeared for and conducted the proceeding on behalf of respondent in the Supreme Court on such appeal, the service of notice was sufficient as against a motion to dismiss on the ground that one of the attorneys only appeared of record as counsel for respondent in the trial court, and that an order of substitution of the firm had not been made.

Service on Clerk of District Court Unnecessary.

3. It is not necessary, in taking an appeal from the district court, that the notice of appeal be formally served upon the clerk of that court. The filing of the notice of appeal in the office of the clerk of the district court in which the judgment appealed from is entered is sufficient notice to the clerk within the meaning of section 5606, Rev. Codes 1899, and no further service upon him is required.

Filing Notice of Appeal. Time.

4. It is not necessary that the notice of appeal be filed in the office of the clerk of the district court in which the order appealed from is entered before the same is served, and a delay of ten days between the service and the filing of the notice of appeal will not defeat the appeal, providing all acts necessary are done within the time limited for perfecting the appeal.

Negotiable Note of Foreign Corporation — Failure to Comply With Sec. 3265 — Good in Hands of Bona Fide Purchaser.

5. A negotiable promissory note, void in the hands of the payee because it is a foreign corporation doing business in the state without having complied with our laws, may be enforced by a bona fide purchaser and indorsee for value, before maturity, without notice of the facts rendering it void in the hands of the payee, notwithstanding section 3265, Rev. Codes 1899.

The Word "Assign" Used in Sec. 3265 Does not Embrace Indorsee of Note.

6. The word "assign," as used in section 3265, Rev. Codes 1899, does not include the indorsee of negotiable paper who takes the same before maturity, for value, and without notice of defenses thereto.

Error to Order Judgment Upon Stipulation not Purporting to Embody All the Facts.

7. Where a stipulation of facts was entered into in writing by counsel for the respective parties, to be used as evidence upon the trial, but did not contain or purport to contain all the facts, it was error for the court, on motion of the defendant, to exclude all evidence on the part of the plaintiff, and to order judgment for defendant upon such stipulation and the pleadings, when the stipulation had not been offered in evidence, and when, upon any theory consistent with the complaint and such stipulation, the plaintiff could have made proof of facts entitling him to recover.

Appeal from District Court, McHenry county; *Palda, J.*

Action by the National Bank of Commerce against R. G. Pick. Judgment for defendant and plaintiff appeals.

Reversed.

W. H. Thomas and Morrill & Engerud, for appellant.

The mere selling of a machine is not *doing business* in the sense of section 3265, Rev. Codes 1899. *Cooper Mfg. Co. v. Ferguson*, 113, U. S. 727, 28 L. Ed. 1137; *Gilchrist v. Helen, etc., Ry.*, 47 Fed. Rep. 593; *Florsheim Bros. Dry Goods Co. v. Lester*, 29 S. W. 34; *Colorado Iron Works v. Sierre Grande Mining Co.*, 25 Pac. 325; *Gates Iron Works v. Cohen*, 43 Pac. 667.

Such interpretation would render it repugnant to the Federal constitution. *Cooper Mfg. Co. v. Ferguson*, *supra*; *Paul v. Virginia*, 75 U. S. 168, 19 L. Ed. 357; *Walton v. State of Missouri*, 91 U. S. 275, 23 Sup. Ct. Rep. 347; *Pembina Consolidated Mining Co. v. Penn.* 125 U. S. 181, 31 Sup. Ct. Rep. 650.

The answer shows but a single transaction and does not allege that the Northwestern Wind Stacker Co. was doing business in the state. The defense is an affirmative one and must be pleaded. *O'Reilly, etc., v. Greene*, 40 N. Y. Supp. 360; *New England Mortgage Security Co. v. Vader*, 28 Fed. 265; *Sprague v. Cutler & Savidge Lumber Co.*, 6 N. E. 335; *G. O. Bee & Sons v. Blalock*, 18 S. E. 264; *Nichols v. People's Loan Ass'n*, 25 S. E. 8.

If the plaintiff was a bona fide holder of the note in controversy, for value, before maturity, without notice, this was a complete bar to the proposed defense. *Press Co. v. City Bank*, 58 Fed. 321, 17

U. S. App. 213; *Williams v. Cheney*, 69 Mass. 215; *Hubbard v. Chapin*, 2 Allen, 328; *Wortendyke v. Meehan*, 2 N. W. 339; *New v. Walker*, 9 N. E. 386.

Christianson & Webber, for respondents.

Noncompliance with the statute is sufficiently pleaded. Violation of statute may be pleaded in general terms. *Meyers Mfg. Co. v. Wetzel et al.*, 35 S. W. 896. The sufficiency of the allegation was not questioned below and cannot be here. *Work et al. v. Kinney, Sheriff, et al.*, 63 Pac. 596.

The notes were in violation of sections 3261, 3263, 3265, Rev. Codes 1899, and are void and invalid and cannot be enforced on the part of the corporation or its assignee. *J. Walter Thompson Co. v. Whitehead*, 56 N. E. 1106; *Meyers Mfg. Co. v. Wetzel et al.*, 35 S. W. 896; *New Hampshire Ins. Co. v. Kennedy et al.*, 36 S. W. 709; *Bradley Metcalf v. Armstrong*, 68 N. W. 733; *Pioneer Saving & Loan Co. v. Eyer et al.*, 87 N. W. 1058; *G. Heilman Brewing Co. v. Piemeisl*, 88 N. W. 441; *Ashland Lumber Co. v. Detroit Salt Co. et al.*, 89 N. W. 904; *Ehrhardt v. Robertson*, 78 Mo. App. 404.

The case was submitted by agreement, upon the complaint, answer and stipulation of facts; and the submission was made by express request and consent of appellant's counsel. The case, so submitted, was considered by the court without objection on the part of appellant. He cannot now question the propriety of the proceeding. *Aldrich v. Carpenter (Mass.)* 35 N. E. 456; *Webster v. Fleming (Ill.)*, 52 N. E. 975; *Sugg et al. v. Thornton*, 9 S. W. 145; *State to use of Mayer v. O'Neill et al.*, 52 S. W. 241; *Watkins v. National Bank of Lawrence et al.*, 32 Pac. 914; *Perkins v. Fish et al.*, 53 Pac. 901; *Work et al. v. Kinney, Sheriff, et al.*, 63 Pac. 596.

COCHRANE, J. This is an appeal from a judgment. Appellant, a national banking corporation at Minneapolis, Minn., sued as transferee of two promissory notes given by the respondent for the purchase price of a wind stacker bought by him from the Northwestern Wind Straw Stacker Company of Minneapolis, a Minnesota corporation. The defendant, by his answer, admitted the making of the notes to the Northwestern Wind Stacker Company and denied the other allegations of the complaint; averred that the notes were

given for the purchase price of a Maple Bay Farmers' Friend Automatic Wind Straw Stacker, bought upon an express warranty, which is set out in the answer; that the stacker failed to work as warranted; that the company was unable to make it fulfill the warranty, and that the defendant thereupon, pursuant to the terms of his contract, returned the stacker at the railroad station and to the company's agent with whom he had contracted for its purchase, and the return of the stacker was accepted by such agent of the company; that defendant thereupon became entitled to a surrender of his notes. He demanded that they be returned to him, but the company failed and neglected to return the same. He alleged that plaintiff purchased the notes after maturity, with knowledge of defendant's defense thereto; that the stacker company was a foreign corporation, organized under the laws of the state of Minnesota, and at the time defendant contracted with it had failed to comply with the provisions of sections 3261 and 3263, Rev. Codes 1899, and never at any time complied therewith; that because of such noncompliance the contract and note were wholly void in behalf of such corporation and its assigns. Defendant prayed judgment that the action be dismissed, for his costs, and such other relief as might be proper.

After a jury had been impaneled and sworn to try the case, and before plaintiff had sworn a witness or offered the notes in evidence, defendant's counsel objected to the plaintiff's introducing any testimony or any proof in support of its cause of action on the ground that it was estopped from maintaining the action under the laws of North Dakota, because it claimed as assignee of a foreign corporation which had not complied with the laws of the state relative to the doing of business therein by foreign corporations, and for the reasons set forth and contained in the stipulation of facts on file. This objection was sustained by the court, and on defendant's motion the action was dismissed and judgment entered for the defendant. These rulings of the court were severally excepted to and are assigned for error upon this appeal.

At the time defendant's objection was made to any evidence and sustained by the trial court, there was on file with the clerk a stipulation of facts entered into between the attorneys, as follows: "That upon the trial of the action the following facts are stipulated to be true for all purposes and intents in the trial of said cause, subject to such objections to the same as might be made for irrelevancy, incompetency and immateriality if the same had been asked from

witnesses on the trial of the cause, to wit: That the Northwestern Wind Straw Stacker Company is and was a foreign corporation organized under the laws of Minnesota, and was such corporation at all times mentioned in the complaint and answer herein. That at the time of making the contract set forth in the answer, and at the time of the making and delivery of the promissory notes sued upon in the action, the Northwestern Wind Straw Stacker Company was doing business in North Dakota and had appointed, among other resident agents, to handle and sell their articles, one Frank Collins, at Willow City, being the person from whom defendant purchased the wind straw stacker mentioned in the answer, and being the agent of said company with whom the contract of purchase was made, and to whom the promissory notes sued upon were delivered for said company. That at the time of making the contract of purchase with said company by the defendant, and at the time of the execution and delivery of the promissory notes sued upon, the company had failed in any manner to comply with the provisions of sections 3261 and 3263, Rev. Codes 1899, relative to the admission of foreign corporations to do business in the state, and that the stacker company at no time up to the commencement of the action had in any manner complied with such statutes. That the facts hereinbefore referred to were entirely unknown to the plaintiff. The first notice plaintiff received of these facts was communicated to it at the time the defendant served his answer on plaintiff's attorney setting out the facts as above set forth, and after investigation on the part of plaintiff in regard to the allegation of defendant therein the facts were discovered to be as above set forth."

Preliminary to a consideration of the case proper, counsel for respondent has made and urged a motion to dismiss the appeal and strike out the statement of the case and to affirm the judgment, for which he assigns many reasons. Few of the objections made are grounds for dismissal. Among other grounds of motion, he claims that the notice of appeal was not served upon the clerk of the district court, and that no proof of such service was filed. The notice of appeal was filed and is marked "Filed" by the clerk of the district court, and this was sufficient notice to that officer. Section 5606, Rev. Codes 1899; *Stierlen v. Stierlen*, 8 N. D. 297, 78 N. W. 990.

Another reason assigned is that the notice of appeal was not addressed to or served upon respondent or his attorney of record and that there is no proof of service of the notice of appeal. A. M. Christianson acted for respondent and signed all papers as his attorney up to the entry of judgment from which this appeal was taken. He now claims that the notice of appeal should have been served upon him individually, and that service upon Christianson & Webber was not a compliance with section 5732, Rev. Codes 1899. A written admission of service is indorsed upon the notice of appeal, signed by Christianson & Webber, as attorneys for respondent, admitting due and sufficient service thereof. It sufficiently appears that A. M. Christianson, the attorney of record on the trial of this case below, and who appeared for respondent in this court, is a member of the firm of Christianson & Webber; but the point is made that said firm was never formally substituted by order of court as attorneys of record in place of A. M. Christianson and that service upon said firm was not service upon A. M. Christianson, a member of said firm, within the meaning of the statute. The briefs, motions, and all papers in this court are signed for respondent in the name of Christianson & Webber. They signed in the firm name, on the day the appeal was taken, a written stipulation waiving bond on appeal and a stipulation for settlement of the statement of the case. It is the fact of service of notice of appeal upon respondent or his attorney which gives jurisdiction. When the notice of appeal was served, and due service thereof admitted by Christianson & Webber, signing themselves as attorneys for respondent, such admission bound each member of the firm as if served upon him individually. Such admission was a representation to opposing counsel and to the court that such attorneys had authority to bind their client by acceptance of service of such notice and counsel for respondent cannot, at this time, be heard to question the sufficiency of such service or proof of service. *Graham v. Conrad*, 66 Minn. 471, 69 N. W. 334, is not an authority in favor of respondent's contention. That case was controlled by the statute which made proof of service, as well as the fact, jurisdictional. Neither is *McKenzie v. Water Company*, 6 N. D. 371, 71 N. W. 608, any justification for this motion. The court in this case held that, for the purpose of starting the running of time for appeal from an order, the respondent would be held to strict proof of the service of notice of the entry of the order; that respondent could not secure the dismissal of an

appeal on the ground that it was not taken in time, except upon clear proof that the time had in fact run, for the especial reason that it was respondent's duty to make the service and proof of service of the notice which started the time.

It is next urged that the notice of appeal was served on the 3d day of August, and filed in the clerk's office on the 12th day of the same month; that the statute requires the filing to be contemporaneous with or to follow immediately the act of serving the notice of appeal. The language of section 5606, Rev. Codes 1899, governing appeals from the district court, is similar to that in section 6771, Id., governing appeals from justice court. This language requires that the notice of appeal be served before it is filed. *Eldridge v. Knight*, 11 N. D. 552, 93 N. W. 860; *Wilson v. Elev. Co.*, 12 N. D. 402, 97 N. W. 535. And the filing of the notice of appeal, with proof of service, within ten days after the service of notice, is sufficient compliance with the statute, providing the filing takes place within the time limited for perfecting the appeal. *Stierlen v. Stierlen*, 8 N. D. 297, 78 N. W. 990. The statement of the case was settled upon a written stipulation of counsel for respondent. It was signed, certified and filed before appeal was perfected. The various objections of counsel to the statement are without merit, and unworthy of serious consideration. The motion to dismiss and to strike out the statement are overruled.

This brings us to the merits. Defendant's objection to any evidence being received in support of plaintiff's complaint, because the plaintiff was the assignee of a foreign corporation which had not complied with the laws of the state as to the doing of business therein, assumed that the very matters which defendant had pleaded in defense and which he had thereby assumed the burden of proving, were established without proof, and that no showing which could be made by plaintiff would entitle it to recover. The allegations of the answer do not constitute a counterclaim, were not pleaded as such, and no affirmative relief was prayed. In consequence no reply was necessary, but the new matter was deemed controverted as upon direct denial. Section 5292, Rev. Codes 1899. By sections 3261 and 3263, Id., a foreign corporation is forbidden to transact any business in this state until it has filed in the office of the secretary of state a duly authenticated copy of its charter or articles of incorporation and, in addition, a certificate appointing such secretary of state and his successors its attorney upon whom

process in any action or proceeding against it may be served, stipulating therein that any service of process made on its said attorney shall be of the same force and validity as if served upon it personally in the state. Section 3265, Rev. Codes 1899, provides that every contract made by or on behalf of any corporation, association or joint-stock company doing business in this state without first having complied with the provisions of sections 3261 and 3263 shall be wholly void on behalf of such corporation, association or joint-stock company and its assigns, but any contract so made in violation of the provisions of this section may be enforced against such corporation, association or joint-stock company. The word "assigns," as used in this statute, does not include the holder in due course of a negotiable instrument. The indorsement of a negotiable instrument, payable to order, and its delivery, so as to constitute plaintiff a holder thereof in due course, within the meaning of sections 30 and 52, c. 100, Civ. Code, would entitle it to recover, notwithstanding any defect of title of the payee named in the note. Such is the positive provision of statute. Section 57, c. 100, Civ. Code. The holder in due course of negotiable paper gets all the rights of the payee against the maker, and more. He can recover when the payee could not. The transferees of contracts or choses in action, also of negotiable paper, when so transferred as to be open to defenses, are properly called "assigns." The rights of assigns to recover upon choses in action and non-negotiable contracts is coextensive with that of the party from whom they take, but no greater. The statute declares: "In the case of an assignment of a thing in action the action by the assignee shall be without prejudice to any set-off or other defense existing at the time or before notice of the assignment." Section 5222, Rev. Codes 1899; *Merrill v. Hurley*, 6 S. D. 601, 62 N. W. 958, 55 Am. St. Rep. 859. And non-negotiable written contracts, when transferred, carry all the rights of the assignor under the instrument to the assignee, subject to all equities and defenses existing in favor of the maker at the time of the transfer. Section 3783, Rev. Codes 1899; *Kirby v. Jameson*, 9 S. D. 8, 67 N. W. 854. The lawmaking power, by use of the word "assigns" in section 3265, Rev. Codes 1899, and omitting mention of the holder in due course of negotiable paper, as effectually exempts such holder in due course from the operation of the statute as if it had so directly declared. In addition to this, section 5222, Rev. Codes 1899, declares that the right of set-off or other defense which may be urged

against the assignee of a chose in action shall not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon a good consideration before due. We are aware that the word "assigns," in its broadest sense, has been given a meaning sufficiently comprehensive to include the indorsee of negotiable paper in due course. *Brown v. Ass'n*, 34 Minn. 545, 26 N. W. 907; *Watson v. Donnelly*, 28 Barb. 658; 4 Cyc. 288. But in this state, both by the statutes above quoted and by the decisions of this court, it has been limited in its meaning to transferees by assignment of choses in action, as distinguished from the holder in due course of negotiable paper; and such word had this well-understood meaning when section 3265 was adopted in the Revision of 1895. In *Dunham v. Peterson*, 5 N. D. 414, 417, 67 N. W. 293, 36 L. R. A. 232, 57 Am. St. Rep. 556, this court said: "In determining whether, under the facts of this case, plaintiff is an endorsee of these notes, we must fall back upon elementary principles, and especially must we keep in mind the foundation of the rule which exempted negotiable paper in the hands of a bona fide purchaser from equities existing against it in the hands of the payee. The assignee of an ordinary chose in action took it subject to all defenses. The reason for this rule was the defect in his title. The assignment did not transfer to him the legal title. It was only in equity that he was regarded as the owner. In a court of law he was obliged to sue in the name of the assignor, and on this account the assignment was without prejudice to defenses against the chose in action in the hands of the assignor. But a different rule has long prevailed with respect to negotiable paper. * * * It has been held, and it is now the law, that the payee, if the note is not also payable to bearer, must indorse it; otherwise he manifests a purpose to assign the paper as a mere chose in action." Here the distinction between an indorsee of negotiable paper and the assignee of a chose in action or nonnegotiable contract is clearly indicated. In *Vickery v. Burton*, 6 N. D. 252, 69 N. W. 193, referring to the evidence of the witness Scovil that he assigned the notes to Vickery, the court said: "A careful perusal of all the evidence brings out the fact that Scovil must have used the term 'assign' in a general sense, and as synonymous with the terms 'transferred,' 'set over,' and like general expressions, and did not intend to be understood as testifying that he made an indorsement of the notes at the time referred to." See, also, *Mooney v. Williams*, 9 N. D. 329, 83 N. W. 237; *Mass. Loan &*

Trust Co. v. Twichell, 7 N. D. 440, 75 N. W. 786; *Porter v. Andrus*, 10 N. D. 562, 88 N. W. 567; *First Nat. Bank v. Flath*, 10 N. D. 281, 86 N. W. 867. In *Mooney v. Williams*, *supra*, the precise question we are considering was involved and it was decided, notwithstanding the provisions of section 3265, that a foreign insurance corporation, payee in negotiable paper, could transfer the same so as to make of the indorsee a holder in due course; and the statement in that opinion to the effect that the corporation payee "had complied with the laws relating to foreign corporations other than insurance companies and was therefore authorized to receive and transfer the note in question unaffected by any statutory prohibition," did not affect the result or take from the authority of that case as a precedent upon the question here involved. The plaintiff, therefore, upon the state of the pleadings, was entitled to make proof of its notes and to show, if such was the fact, that it was a holder in due course; and the court was not justified in assuming, upon the pleadings alone, that such proof could not be made.

It is urged that the stipulation of facts foreclosed all question of recovery by plaintiff. The stipulation of facts was not offered in evidence. It does not purport to contain all the facts; nor does it say that the case was to be submitted and determined on the stipulated facts alone. The stipulation reserved the right to make objection on the trial to any fact stipulated, upon any ground which might have been urged against the proof if offered from a witness. This could not be done until the stipulation was offered. The facts set out in the stipulation that the plaintiff was entirely unaware that the stacker company had not complied with the laws of the state of North Dakota, and that the transaction out of which the notes were obtained took place in North Dakota, until served with the complaint in the action, must have been inserted in such stipulation at plaintiff's request. Such facts were pertinent only as links in the chain of evidence by which plaintiff would attempt to show that it was an indorsee in due course of the notes in suit when the burden was cast on it so to do. Section 59, c. 100, Civ. Code. The very form of the stipulation suggests that plaintiff expected to supplement this stipulation by proof that the notes were indorsed before maturity for value. If the stipulation was understood to contain all the facts upon which the case was to be submitted, it should have so stated, and the statement of the case should have recited the fact. Neither the stipulation nor statement contain any such agree-

ment. The court therefore erred in foreclosing plaintiff's proofs and in accepting a partial statement of the facts as conclusive against its right of recovery. "The parties may agree upon a part of the facts upon which a case may be heard and determined in the lower court. Such agreement is only evidence which the parties concede may be regarded as conclusive and must be brought into the record like any other evidence." *Sweet v. Myers*, 3 S. D. 329, 53 N. W. 187. In *Citizens' Ins. Co. v. Harris*, 108 Ind. 392, 9 N. E. 299, it is said: "The agreement as to the facts is but an agreement as to what the evidence would establish, and it is only in the record by force of the bill of exceptions. But while the agreement as to the facts is in the record, there is no statement in the bill showing that it contains all the evidence and, as there can be no decision of the questions presented without a consideration of all the evidence, it must be held that the appeal fails."

The judgment appealed from is reversed and the case remanded for further proceedings. All concur.

(99 N. W. 63.)

ALICE M. McCLURE V. JOHN J. HUNNEWELL.

Opinion filed March 9, 1904.

Injunction Pendente Lite — Complaint — Affidavit.

1. To authorize an injunction pendente lite pursuant to subdivision 1, section 5344, Rev. Codes 1899, the complaint must exhibit a right to a judgment of injunction, and the demand for relief must pray that the defendant be restrained from the commission or continuance of the act complained of, the commission or continuance of which, during the litigation, would produce injury to plaintiff. A defect in the complaint in this regard cannot be supplied by affidavit.

Appeal from District Court, Ward county; *Palda*, J.

Action by Alice M. McClure against John J. Hunnewell. Judgment for plaintiff and defendant appeals.

Reversed.

James Johnson, for appellant.

The plaintiff had adequate remedy at law; the action itself was an action at law, only a money judgment being asked. No injunction lies. *Stone v. Snell*, 94 N. W. 525; *Ganow v. Denney*, 94 N. W. 959; *Forman v. Healey*, 11 N. D. 563, 93 N. W. 866.

N. Davis, for respondent, filed no brief.

COCHRANE, J. The parties hereto are rival claimants to a quarter section of public land. The complaint alleges that plaintiff was in possession of the land described under the homestead laws of the United States and that the defendant unlawfully entered upon the land and dug a ditch or tunnel thereon, to plaintiff's damage in the sum of \$200, and prays for a money judgment of \$200 and costs. An order to show cause was obtained upon affidavit and, after hearing, an injunction *pendente lite* was issued, restraining "the defendant and each of his servants, employees, agents and each and every person acting for and under him, from in any manner trespassing or going upon the land described for any purpose whatever, and from in any manner interfering with or disturbing plaintiff in her occupation, use and cultivation of said described land, during the pendency of this action." Defendant appealed from this order.

The complaint does not state a cause of action for injunctive relief and such relief is not demanded in the complaint. The statute (section 5344, subd. 1, Rev. Codes 1899), provides: "When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the plaintiff," an injunction may be granted. This statute is exclusive, and defects in the complaint cannot be made good through affidavits used to support the motion for temporary injunction. This case is ruled by the case of *Forman v. Healey*, 11 N. D. 563, 83 N. W. 866.

The order appealed from is reversed. All concur.
(99 N. W. 48.)

IRENE C. KING v. MARY D. HANSON.

Opinion filed April 16, 1904.

**An Appeal From an Order Taken Within the Period Allowed by Law
May be Had After Time to Appeal From a Judgment Has Expired.**

1. Under the statutes of this state, the remedies afforded by an appeal from a judgment and an appeal from an order refusing a new trial are independent remedies. The right to appeal from an order denying a motion for new trial may be exercised after the time for appealing from the judgment has expired, provided the appeal is

taken within the time limited by statute for appealing from such orders.

Appeal — Time of Taking.

2. Section 5605, Rev. Codes 1899, which prescribes the time for appealing from judgments and orders, grants a full period of sixty days after written notice thereof in which to appeal from orders. The additional time given by said section applies only to those orders which require the subsequent settlement of a statement of case for the purpose of a review upon appeal.

A Married Woman Can Maintain Action for Alienation of Husband's Affections.

3. In this state, and also in Minnesota, a married woman may maintain an action against another woman to recover damages for the alienation of the affections of her husband, and his consequent abandonment of her.

Evidence of Adulterous Relation in State Where Such Action Does Not Lie, Proper.

4. It was not error to admit evidence tending to show a continuation of the adulterous relation of the defendant and plaintiff's husband in Wisconsin, occurring after the latter had abandoned the plaintiff in Minnesota, although in Wisconsin the alienation of the affections of a husband does not constitute an actionable wrong.

Where the Admission of Evidence Depends Upon Disputed Facts, the Dispute May Be Submitted to the Jury Under Proper Hypothetical Instructions.

5. The preliminary question of the admissibility of evidence is for the court. Where, however, the question of admissibility depends upon disputed facts, the court may submit the evidence to the jury, with proper hypothetical instructions upon the rules of law which shall govern them upon the different states of facts as they shall find them.

Instructions.

6. The instruction given in this case relative to the testimony of attorneys was not open to the criticism that it singled out, and cast discredit upon, the testimony of one of the witnesses for the defendant.

Sequestration of Witnesses is Within the Discretion of the Court.

7. It is within the discretion of the trial judge to exclude witnesses from the courtroom while other witnesses are testifying, and in this case there was no abuse of discretion in so doing.

Exemplary Damages.

8. In an action where exemplary damages may be awarded, it is proper to admit evidence of the defendant's wealth.

Commitment of an Attorney in Progress of Trial — Procedure.

9. An order of the trial court, made during the progress of the trial, punishing an attorney for contempt, is an independent order, and, as such, is appealable by the party aggrieved. Where the client of such attorney desires to urge the action of the court in punishing his attorney "as an irregularity in the proceedings of the court, * * * and abuse of discretion by the court, by which the defendant was prevented from having a fair trial," the application "must be upon affidavit," under section 5473, Rev. Codes 1899.

Appeal from District Court, Towner county; *Cowan, J.*

Action by Irene C. King against Mary D. Hanson (now Mary D. Thompkins). Judgment for plaintiff. Defendant appeals.
Affirmed.

Guy C. H. Corliss, for appellant.

A wife cannot maintain an action against a person for alienating her husband's affections, unless her husband has been enticed from her. The gist of the action is not the loss of affection, but the loss of consortium. *Betser v. Betser*, 58 N. E. 249; *Houghton v. Rice*, 54 N. E. 843; *Neville v. Gile*, 54 N. E. 841; *Humphrey v. Pope*, 54 Pac. 847; *Haynes v. Nowlin*, 29 N. E. 389; 1 Bish. on Mar. & Div., sec. 1358; *Ash v. Prunier*, 105 Fed. 722; *Lockwood v. Lockwood*, 70 N. W. 784; *Crocker v. Crocker*, 98 Fed. 702; *Kroessin v. Keller*, 62 N. W. 438; *Westlake v. Westlake*, 34 Ohio St. 621; *Bennett v. Bennett*, 23 N. E. 17; *Nichols v. Nichols*, 134 Mo. 187; *Clow v. Chapman*, 28 S. W. 328; *Mehrhoff v. Mehrhoff*, 26 Fed. 13; *Warren v. Warren*, 50 N. W. 842.

It is only when the efforts to produce the unlawful result have been successful that an actionable wrong is committed. If there is no wrong under the laws of the state where the husband abandons the wife, there is no tort which can be enforced in any other jurisdiction. *Debevoise v. Railroad Co.*, 98 N. Y. 377; *Wooden v. Western N. Y. & R. R. Co.*, 26 N. E. 1050; *Kohl v. Railroad Co.*, 10 So. 661; *Carter v. Doode*, 50 Ark. 155; *Hyde, Admr., v. Wabash St. L. & P. Ry. Co.*, 16 N. W. 351, 47 Am. Rep. 820; *Alexander v. Pennsylvania Co.*, 30 N. E. 69; *DeHearn v. Railroad Co.*, 23 S.

W. 381; Western Union Tel. Co. v. Phillips, 21 S. W. 638; Alabama, etc., R. R. Co. v. Carroll, 11 So. 803.

Where acts of negligence occur, or are set in motion in one state, and the resulting wrong occurs in another, the act is characterized by the law of the latter. Alabama, etc., R. R. Co. v. Carroll, 11 So. 803; Simpson v. Stole, 17 S. E. 984; State v. Morrow, 18 S. E. 853; State v. Bailey, 36 N. E. 233; State v. Hall, 19 S. E. 602.

If the act of enticing the plaintiff's husband was consummated in Wisconsin, there is no ground for action against the defendant, it being conceded that no such action lies in that state.

Section 5653, subdiv. 1, Rev. Codes 1899, is a mere continuation of the common law and relates only to secret communication between husband and wife. If the third person is present when a communication is made, or a letter containing it is exhibited to a third party or its contents stated to him, the case is not within the statute; and husband or wife can be compelled to testify to the same. State v. Center, 35 Vt. 379; Hagerman v. Wigent, 65 N. W. 756; Gannon v. People, 21 N. E. 525; McCague v. Miller, 36 Ohio St. 595; Higbee v. McMillan, 18 Kans. 133; Long v. Martin, 71 Mo. App. 569; Ward v. Oliver, 88 N. W. 631; Sessions v. Trevitt, 39 Ohio St. 259; Reynolds v. State, 46 N. E. 31; Mainerd v. Bender, 91 Am. Dec. 291; Fay v. Guymon, 131 Mass. 31; Commonwealth v. Griffin, 110 Mass. 181; State v. Gray, 39 Pac. 1050; Mercer v. Patterson, 41 Ind. 440; Lyon v. Prouty, 28 N. E. 908.

It is the province of the court to determine all questions of fact, preliminary to the admission of any instrument or paper, or the testimony of any witness without reference to the jury. Bartlett v. Smith, 11 M. & W. 483; Gorton v. Hadsell, 9 Cush. 511; 1 Thompson on Trials, sections 318, 324; Jenkins v. Davis, 10 Q. B. 314; Chouteau v. Searcy, 8 Mo. 733; Cook v. Mix, 11 Conn. 432; Robinson v. Ferry, 11 Conn. 460; Witter v. Latham, 12 Conn. 392; Coleman v. Wolcott, 4 Day, 388; 1 Starkie on Evid. 354; Donelson v. Taylor, 8 Pick. 390; Wickliffe v. Lynch, 36 Ill. 209; State v. Michael, 19 L. R. A. 605; Commonwealth v. Reagon, 56 N. E. 577; Tabor v. Stanuels, 2 Cal. 240; Mead v. Harris, 60 N. W. 284; Bowdle v. Railway Co., 61 N. W. 529.

This section, 5653, does not declare that a communication between husband and wife shall not be received in evidence; but that neither without the other's consent shall be *examined* as to such communication. State v. Hoyt, 47 Conn. 518; State v. Buffington, 20 Kans.

599; Lloyd v. Pennie, 50 Fed. 4; 1 Greenleaf on Ev., section 254a; 1 Whart. Ev., section 427.

A third party is not liable to a wife, under the laws of North Dakota, for enticing away her husband. Section 2718 provides: "The rights of personal relation forbid: 1. The abduction of a husband from his wife. 2. The abduction or *enticement* of a wife from her husband." There is an interference with the rights of the husband when the wife is either abducted or *enticed* from him; but there is no interference with the rights of the wife unless the husband is abducted, that is carried away by force, from her. Humphrey v. Pope, 54 Pac. 847, to the contrary is not a sound decision. Courts will not enforce a cause of action for a tort arising under a foreign law, because the cause of action is opposed to the policy of the jurisdiction where the suit is brought. Gardner v. Thomas, 14 Johns. 134; Johnson v. Dalton, 1 Cow. 543; Railroad Co. v. Jackson, 33 S. W. 857; Railroad Co. v. Richards, 68 Tex. 375; Railroad Co. v. McCormick, 71 Tex. 660; Ash v. Railroad Co., 72 Md. 144; Dale v. Atchison, T. & S. F. R. Co., 47 Pac. 521; Matheson v. Kansas City, Ft. S. & M. R. Co., 60 Pac. 747; Burdick v. Freeman, 46 Hun, 138; Maloney v. Dows, 8 Abb. Pr. 316; Whart. Conflict of Laws, section 478.

It was error to receive evidence of defendant's wealth and charge the jury to consider it in fixing the amount of damages. Hunt v. R. Co., 26 Iowa, 363; Guengerech v. Smith, 34 Iowa, 348; Southern Car Co. v. Adams, 32 So. pp. 503-507; Givens v. Berkley, 56 S. W. 158; Field on Damages, 127; Kniffen v. McConnell, 30 N. Y. 285.

Burke & Middaugh, Welch, Hayne & Hubachek, for respondent.

The trial judge has discretion to exclude some of the witnesses and allow others to remain. 1 Greenleaf on Ev., 432; Chicago. B. & Q. R. Co. v. Kellogg, 74 N. W. 403; Wilson v. State, 52 Ala. 299; People v. McCarty, 117 Cal. 65, 48 Pac. 984.

The court did not in its charge, single out the testimony of Mr. Davis, an attorney in the case, as alleged by counsel. It is true, it is of doubtful propriety for an attorney to be a witness without wholly withdrawing from the case, and he is open to criticism and suspicion unless he does. 1 Greenleaf on Ev., 386; Best on Ev., 184; Ross v. Demos, 45 Ill. 447; Blashfield on Instr., 225; Wiseman v. Cornish, 53 N. C. 218; Com. v. Pease, 137 Mass. 576. The instructions given were proper. Sackett on Instructions, 50.

If the instructions applied only to Mr. Davis, still they were correct. It is not error to instruct the jury that they shall consider the interest of the defendant in the result of the trial. *Johnson v. State*, 34 Neb. 257; *People v. Petmecky*, 99 N. Y. 415; *People v. Calvin*, 60 Mich. 113; *State v. Singerland*, 7 Pac. 280; *People v. Knapp*, 11 Pac. 793; *Bressler v. People*, 8 N. E. 62; *Munich v. People*, 9 Pac. 4; *State v. Sterrett*, 32 N. W. 387; *State v. McGinnis*, 76 Mo. 326; *State v. Wisdom*, 84 Mo. 177.

The court did not err in admitting exhibit 10—letter from plaintiff to her husband—and in instructing the jury in regard to it. There was a conflict of testimony as to whether plaintiff wrote exhibit 10; and if she did write it, whether she first read it to her husband before sealing it for delivery to him. If such question arises on the paper itself, it is the duty of the court to determine such question. But if it is necessary to resort to extrinsic evidence, in which there was a conflict, it was proper to submit the matter to the jury under a conditional or hypothetical charge. *State v. Haynes*, 7 N. D. 352; 75 N. W. 267; 1 *Abbott's Trial Brief* (Civ.) 459; *Reynolds v. Richards*, 14 Penn. St. 205; *Stokes v. Johnson*, 57 N. Y. 673; 11 *Enc. Pl. & Pr.* 86; 1 *Greenleaf on Ev.*, section 49; *Holliday v. Butt*, 40 Ala. 178; *Jordan v. State*, 52 Ala. 188.

If the admission of such letter was error, it was committed at the instance of the defendant and she cannot avail herself of it. *Thompson v. McKay*, 41 Cal. 221; *Bigelow on Estoppel*, 602; *Ry. Co. v. Marcott*, 41 Mich. 433; *Smith v. Rathburn*, 75 N. Y. 122.

The declarations of husband and wife are subject to the same rules of exclusion which govern their testimony as witnesses. *Nat. Ger. Am. Bk. v. Lawrence*, 79 N. W. 1016; 1 *Greenleaf on Ev.*, section 341; 1 *Phil. Ev.* 80; *Hall v. Hill*, 2 *Strange*, 1094; *Ross v. Winners*, 6 N. J. Law, 366.

Some states hold that the privilege is absolute and cannot be waived by either spouse. *Campbell v. Chace*, 12 R. I. 333; *O'Conner v. Marjoribanks*, 44 M. & G. 435; *Hopkins v. Grimshaw*, 165 U. S. 342; 17 *Sup. Ct. Rep.* 401; *Hubbell v. Grant*, 39 Mich. 641.

There are some cases holding that the concurrence of both spouses is required for a waiver. *Bradford v. Vinton*, 26 N. W. 401; *People v. Wood*, 27 N. E. 362; *Newstrom v. St. Paul & D. R. Co.*, 63 N. W. 253; *Warner v. Press Pub. Co.*, 30 N. E. 393; *Herrick v. Hertrick*, 87 N. W. 689.

An action for alienating a husband's affections can be maintained in this state under sections 2713, 2714.

Such action is maintainable at common law. *Bennett v. Bennett*, 116 N. Y. 583, 6 L. R. A. 555; *Lych v. Knight*, 9 H. L. Cas. 577; *Foote v. Card*, 58 Conn. 1, 6 L. R. A. 829; *Nichols v. Nichols*, 134 Mo. 187; *Wolf v. Frank*, 92 Md. 138; *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. 389.

It is claimed the word "abduction" used in the statute does not mean a *leading* estray, and this action cannot be maintained, and *Duffies v. Duffies*, 45 N. W. 522, is cited in support.

This case is criticised in *Warren v. Warren*, 50 N. W. 842. Against the principle are the following: *Dietzman v. Mullin*, 50 L. R. A. 808; *Bennett v. Bennett*, 116 N. Y. 583, 6 L. R. A. 555; *Humphry v. Pope*, 54 Pac. 847; *Haynes v. Nowlin*, 129 Ind. 581; *Reg. v. Manktelow*, 6 Cox's C. C. 143; *State v. Gordon*, 46 N. J. 432; *State v. Seeley*, 37 Hun. 190; *State v. Bussey*, 50 Pac. 891; *State v. Keith*, 50 N. W. 691; *State v. Johnson*, 22 S. W. 463; *State v. Stone*, 16 S. W. 890; *State v. South*, 37 S. W. 210; *Rex v. Olifier*, 10 Cox's C. C. 402.

Such a case has been at least impliedly permitted in this state. *Kinneberg v. Kinneberg*, 8 N. D. 311, 79 N. W. 337.

Under statutes emancipating married women from the fiction of legal unity and giving them the right to sue and be sued the same as before marriage, and to enjoy their own property, they have a remedy in the courts against one who wrongfully invades this natural right. Among such states are New York, *Bennett v. Bennett*, supra; Kansas, *Mehrhoff v. Mehrhoff*, 26 Fed. 13; Pennsylvania, *Gerner v. Gerner*, 185 Pa. St. 233; New Hampshire, *Seaver v. Adams*, 66 N. H. 142; Missouri, *Clow v. Chapman*, 125 Mo. 101, etc.

It is claimed that a North Dakota court should not entertain this action, because, if the tort was committed in Minnesota where the plaintiff resides, she should not be allowed to come into this jurisdiction to sue. It is a sufficient answer that even if both parties were non-residents and the tort committed in a foreign state, still the action can be brought here, because it is a transitory action and can be brought where the defendant is found, if not against the public policy of the state where it is commenced. *Herrick v. Minneapolis & St. L. Ry. Co.*, 16 N. W. 413; *Meyers v. Chicago*, St. P. M.

& O. Ry. Co., 72 N. W. 694; Northern Pac. Ry. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. Rep 978.

Upon the question under a claim for punitive damages, the defendant may be allowed to introduce evidence of defendant's wealth, the cases cited by appellant stand alone against the majority of the state courts, and the best text writers. Where compensatory damages are sought, a defendant should have judgment rendered against him regardless of his financial condition. But when it comes to assessing damages by way of punishment or example, it is right that the jury consider the financial condition of the defendant. In the column so holding are the following states: Maryland, 61 Md. 89 Minnesota, 22 Minn. 90; New Hampshire, 49 N. H. 358; Mississippi, 74 Miss. 782; Missouri, 58 Mo. 368; Wisconsin, 61 Wis. 450, etc.; 1 Sedgewick on Damages, (8th Ed.) 385; 1 Sutherland on Damages (2nd Ed.) sections 404, 405; 1 Joyce on Damages, 144; Waldron v. Waldron, 45 Fed. 315.

It is competent to show the hostility of a witness, but he must first be examined in reference thereto; if he admits it, that is enough; the hostility is shown; if he denies it, he may be contradicted or impeached. If he admits it, he cannot. Atwood v. Welton, 7 Conn. 66; Collins v. Stephenson, 8 Gray, 438.

YOUNG, C. J. The plaintiff, Irene C. King, brought this action to recover damages from the defendant, Mary D. Hanson, for the alleged alienation of the affections of her husband, Charles M. King, and the consequent loss of his society, support and protection. The jury awarded damages in the sum of \$6,000. The defendant made a motion for a new trial upon a statement of case, in which she specified 186 alleged errors as grounds for the motion. This appeal is from the order overruling the motion.

Counsel for respondent submitted a preliminary motion to dismiss the appeal upon the grounds (1) that the order denying the motion for a new trial was not signed by the trial judge, and a notice of appeal therefrom was not served upon the respondent, until after the time for appealing from the judgment had expired; and (2) that the trial judge did not settle the statement until more than 60 days after it was submitted to him for settlement, and the appeal was not perfected within 30 days after it was settled. Both of these grounds present jurisdictional questions. It appears that judgment was entered and notice of entry served on January 12, 1902, and that notice of intention to move for a new trial upon a statement to

be thereafter settled was seasonably served. On August 24, 1902, by stipulation of counsel, the statement of case prepared as a basis for the motion was submitted to the court for settlement. It was not settled until December 31, 1902. On February 3, 1903, thereafter, the motion for a new trial was overruled. This appeal was taken on March 2, 1903. It will thus be seen that the time for appealing from the judgment had expired when the order overruling the motion was made, and the notice of appeal from the order was served. In our opinion, the appeal was taken in time, and the motion to dismiss must therefore be denied. The first ground of the motion is based upon the assumption that the time for appealing from an order granting or refusing a new trial expires when the time for appealing from a judgment has expired. This is erroneous. The remedy afforded by an appeal from a judgment and the remedy by appeal from an order granting or refusing a new trial are wholly independent remedies. A party aggrieved may invoke one or the other, or both, at his election, provided only he does so within the time and in the manner provided by statute. The periods of time in which these independent rights may be exercised are fixed by the statute, and are in no respect dependent one upon the other. Section 5605, Rev. Codes 1899, which prescribes the time for appealing from judgments and orders, reads as follows: "An appeal from a judgment may be taken within one year after the entry thereof by default, or after written notice of the entry thereof in case the party against whom it is entered has appeared in the action, and from an order within sixty days after written notice of the same shall have been given to the party appealing; provided, that in all actions heretofore or hereafter tried, when the appeal from an order is based upon errors assigned or set out in a statement of the case submitted to the court or judge thereof for settlement within sixty days after the service of such written notice and at least eight days prior to the expiration of such time and such court or judge neglects to settle such statement within the said sixty days, the party appealing shall have thirty days after such statement shall have been settled in which to take an appeal." Under the above section an appellant has one year in which to appeal from a judgment, and he also has an absolute period of 60 days after written notice in which to appeal from an order. As to some orders the proviso in the above section adds a further period of time; that is, when the order from which it is proposed to appeal requires the settlement

of a statement of case as a prerequisite to a review in this court. The period of time for appealing from orders which do not require the subsequent settlement of a statement to secure a review is limited to 60 days. It is only when a statement is necessary to present the errors relied upon for a review of the order that the additional time is given. In such cases it is given if a statement of case is submitted at least 8 days prior to the expiration of the 60-day period. In case the court or judge neglects to settle such statement within the 60 days, the 60-day limitation does not apply, but the party appealing is given 30 days after the statement is settled in which to appeal. But that is not this case. Here the order appealed from was made after the statement was settled and was based upon such statement. The statement was not submitted after the order was served as a basis for securing a review, but was submitted and settled before the order was made and constituted the basis for the order overruling the motion for new trial. The facts stated in the second ground of the motion, namely, "that the trial judge did not settle the statement until more than sixty days after it was submitted to him for settlement, and the appeal was not perfected within thirty days after it was settled," do not affect the time for appealing in this case, for the reason that the order appealed from was made before, and not after, the statement was settled, and the time limit contained in the proviso has no application whatever to this order. It frequently happens that orders are made which cannot be reviewed upon an appeal, except upon a statement of case subsequently settled—for instance, orders overruling or granting motions for new trial based wholly upon the court's minutes. Settlement of statements in these and similar cases frequently becomes necessary for the review of such orders. See *Bank v. Gilmore*, 3 N. D. 188, 54 N. W. 1032; *Oliver v. Wilson*, 8 N. D. 590, 80 N. W. 757, 73 Am. St. Rep. 784; *Bailey v. Scott*, 1 S. D. 337, 47 N. W. 286.

We now turn to the merits. The complaint alleges that the plaintiff and her husband, Charles M. King, were married in the state of Minnesota in January, 1890, and that they thereafter resided as husband and wife in that state until January, 1900; that plaintiff has three children, the issue of said marriage, all of whom are in her care and custody, the eldest being about the age of eight years, and the youngest of the age of about four months; that in October, 1899, at Cando, in this state, the defendant and plaintiff's husband first became acquainted, and that from that time, and continuously until

about the 1st of February, 1900, at Cando aforesaid, and at the city of Minneapolis, Minn., and elsewhere, the defendant, knowing that the said Charles M. King was plaintiff's husband, wrongfully, wickedly and maliciously contriving and intending to injure plaintiff, and to deprive her of the comfort, society, support, aid and affection of her said husband, maliciously enticed the plaintiff's said husband away from plaintiff, and from the home of plaintiff and her said children at Minneapolis aforesaid, and wrongfully, wickedly and maliciously induced, caused and persuaded plaintiff's said husband to abandon her and her said home and family, and to commit adultery with her (the defendant), and to live in adultery with her (the defendant), and that in consequence thereof, and by means of the arts, wiles and inducements of the said defendant, and caused solely thereby, the said Charles M. King, plaintiff's husband, did on or about the 1st day of February, 1900, at said city of Minneapolis, desert, cease to support, and abandon this plaintiff and their said home and their children, which desertion and failure to support plaintiff and said children has ever since continued, and that plaintiff's said husband, in company with said defendant, on or about said date last named, departed from the state of Minnesota, and went to the state of Wisconsin, where the said defendant and plaintiff's husband have ever since resided, and under the same roof now reside, at the city or village of Rice Lake, in said state, and that defendant and the plaintiff's said husband, as plaintiff is informed and verily believes, are now there living together in adultery; that plaintiff's husband has wholly abandoned plaintiff and her children, and refused again to live with plaintiff or to support her and their children, by reason of the arts, wiles and inducements of said defendant, whereby the affection of her said husband has been wholly alienated and destroyed, and the plaintiff has ever since been, and now is, deprived of the comfort, society, assistance, support, love and affection which she otherwise would have had, and, by reason of the wrongful acts of the defendant, has suffered great distress of body and mind, and her domestic peace and happiness have been forever destroyed. The complaint further alleges that the defendant is a widow, 27 years of age, of considerable wealth, and reputed to be the owner of a large amount of real estate in the state of North Dakota, and is worth at least the sum of \$30,000, and demands judgment for the sum of \$10,000. The allegations of the answer, so far as important upon this appeal, consist of a general denial, and an

averment "that the acts alleged in plaintiff's complaint, in so far as the same are claimed to have taken place in the state of Minnesota, and in so far as said acts are alleged as done to alienate, or in fact did alienate, the affections of plaintiff's husband, do not state a cause of action enforceable under the laws of the state of North Dakota."

The complaint alleges, and the answer admits, that in the state of Minnesota a married woman has the right to maintain an action against another woman for the alienation of the affections of her husband, when occasioned or induced by the acts or conduct of the other woman.

No attack is made upon the sufficiency of the evidence to sustain the verdict. Only a portion of the errors specified in the statement are assigned for error in appellant's brief. Those which are assigned and argued relate to alleged errors in giving and refusing instructions, admitting and rejecting evidence, and refusing to direct a verdict for defendant.

The most important question presented is whether in this state this action is maintainable. It is contended by appellant that the alienation of the affections of a husband from his wife, and his consequent abandonment of her, when occurring in this state, do not constitute a legal wrong for which she can recover damages; and assuming this to be the policy of the law in this state, it is contended that the courts of this state should decline to entertain actions to recover damages when the consummated act of abandonment occurred in a state where it constitutes a legal wrong and is remediable. We do not assent to the contention that the wrong done to the abandoned wife is merely a moral wrong, and is not a legal wrong. At common law a husband was entitled to the society of his wife and could maintain an action for the alienation of her affections. Just what the corresponding right of the wife was, has been a matter of much debate. But judicial opinion is to the effect that the right of the wife to the society, affection and support of her husband is a natural right. The remedy for the alienation of the affections of her husband was denied to her, not because she suffered no wrong, but because (1) at common law she had by her marriage lost her legal identity, and could not sue independent of her husband; and (2) damages recovered for wrongs done her belonged, not to her, but to her husband. The injury to the husband, caused by the alienation of the affections of his wife, was remediable. The injury to

the wife, caused by the alienation of the affections of her husband, was not remediable. As to her it was, in short, a wrong without a remedy. The statutes of this state, in common with those of the other states, have removed this disability. It is a maxim of the jurisprudence of this state that "no one should suffer by the act of another" (section 5082, Rev. Codes, 1899), and that "for every wrong there is a remedy." Section 5085, Id. "* * * The wife after marriage has with respect to property, contracts and torts the same capacity and rights and is subject to the same liabilities as before marriage, and in all actions by or against her she shall sue and be sued in her own name." Section 2767, Id. See, also, section 2766, Id. The effect of these statutes is to authorize the wife to maintain actions with reference to property, contracts, and torts in her own name, and damages recovered by her for wrongs done to her belong to her, and not to her husband, as formerly. It is almost universally held, in states wherein similar statutes have been enacted, that the wronged wife may maintain an action for the alienation of the affections of her husband, and the reason assigned is that the statute has removed the disabilities which caused a denial of the remedy at common law. These decisions meet our full approval. *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 16, 6 L. R. A. 553; *Mehrhoff v. Mehrhoff* (C. C.), 26 Fed. 13; *Gerner v. Gerner*, 185 Pa. 233, 39 Atl. 884, 40 L. R. A. 549, 64 Am. St. Rep. 646; *Clow v. Chapman*, 125 Mo. 101, 28 S. W. 328, 26 L. R. A. 412, 46 Am. St. Rep. 468; *Nichols v. Nichols*, 134 Mo. 187, 35 S. W. 577; *Seaver v. Adams*, 66 N. H. 142, 19 Atl. 776, 49 Am. St. Rep. 597; *Wolf v. Frank*, 92 Md. 138, 48 Atl. 132, 52 L. R. A. 102; *Dietzman v. Mullin* (Ky.) 57 S. W. 247, 50 L. R. A. 808, 94 Am. St. Rep. 390; *Betser v. Betser*, 186 Ill. 537, 58 N. E. 249, 52 L. R. A. 630, 78 Am. St. Rep. 303; *Waldron v. Waldron* (C. C.) 45 Fed. 315; *Lockwood v. Lockwood*, 67 Minn. 476, 70 N. W. 784; *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. 389, 14 L. R. A. 787, 28 Am. St. Rep. 213; *Holmes v. Holmes*, 133 Ind. 386, 32 N. E. 932; *Price v. Price*, 91 Iowa, 693, 60 N. W. 202, 29 L. R. A. 150, 51 Am. St. Rep. 360; *Beach v. Brown* (Wash.) 55 Pac. 46, 43 L. R. A. 114, 72 Am. St. Rep. 98; *Hodgkinson v. Hodgkinson*, 43 Neb. 269, 61 N. W. 577, 27 L. R. A. 120, 47 Am. St. Rep. 759; *Humphrey v. Pope*, 122 Cal. 253, 54 Pac. 847; *Warren v. Warren*, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545; *Williams v. Williams*, 20 Colo. 151, 37 Pac. 614; *Tucker v. Tucker*, 74 Miss. 93, 19 South. 955, 32 L. R.

A. 623; *West Lake v. West Lake*, 34 Ohio St. 621, 32 Am. Rep. 359; *Foot v. Card*, 58 Conn. 1, 18 Atl. 1027, 6 L. R. A. 829, 18 Am. St. Rep. 258. The exceptions are the states of Maine and Wisconsin. *Doe v. Roe*, 82 Me. 503, 20 Atl. 83, 8 L. R. A. 833, 17 Am. St. Rep. 499; *Duffies v. Duffies*, 76 Wis. 374, 45 N. W. 522, 8 L. R. A. 420, 20 Am. St. Rep. 79. The Maine court was of the opinion that the right of the wronged wife to sue for a divorce and a division of property, and to prosecute the guilty parties criminally, were adequate remedies, and that to accord to her the same remedies given to a wronged husband would be unwise, as a matter of policy. The decision in the Wisconsin case was by a divided court; the majority being of the opinion that at common law the wife had no legal right to the consortium of her husband, and that it would require affirmative legislative action (and this was also the opinion of the Maine court) to give her the right, and consequently that the mere removal of common-law disabilities was not sufficient. This position has been unsparingly criticised by all courts wherein the case has been referred to, and the doctrine as laid down in that case is only adhered to in that state at this time under the rule of stare decisis, and then only by a divided court. See *Lonstorff v. Lonstorff* (Wis.) 95 N. W. 961. But our statute goes further than the mere removal of the common-law disabilities of married women, and speaks affirmatively. Section 2718, Rev. Codes 1899, provides that "the rights of personal relation forbid (1) the abduction of a husband from his wife; * * * (2) the abduction or enticement of a wife from her husband. * * *" This section is identical in language with section 49 of the civil code of California. It will be noted that this section forbids the abduction of a husband from the wife, as well as the abduction of a wife from her husband. The "abduction" referred to in this section is the taking away by either violence, fraud or persuasion; the word "abduction" being used therein according to its long-settled meaning. See 3 Black. Comm. 139; 2 Addison on Torts (4th Ed.) 1099; Cooley on Torts (2d Ed.) 225; *State v. Chisenhall*, 106 N. C. 679, 11 S. E. 518; *People v. Seeley*, 37 Hun. 192; 1 Am. & Eng. Enc. Law, 163. This construction was adhered to in *Humphrey v. Pope*, 122 Cal. 253, 54 Pac. 847, which was an action by a wife to recover damages against another woman for the alienation of her husband's affections. It was contended in that case, as it has been in this, that the word "abduction" should be held to mean a forcible taking, and something

different from a taking by enticement or persuasion; the argument being based upon the ground that the word "enticement," found in subdivision 2, is omitted from subdivision 1. This was denied. The court said: "The word 'abduct' is from the Latin *ab-duco*, to lead away. Abduction is the taking away a wife, child or ward by fraud and persuasion or open violence. *Carpenter v. People*, 8 Barb. 606; *State v. George*, 93 N. C. 570. In private or civil law it is the act of taking away a man's wife by violence or persuasion. 3 Stephen's Commentaries, 536. In reason, the wife should be as much entitled to sue for violation of her personal right, where her husband has been taken away from her by enticement, if such right exist at all, as should the husband when his wife has been enticed from him. Ordinarily the injury is greater to the wife than to the husband. We are unwilling to give a construction to this section which would limit the wife to an action when her husband has been forcibly taken from her. Our criminal statute as to the crime of abduction for purposes of prostitution uses the words 'takes away' for the word 'abduct,' and it has been held 'that a physical carrying away is not required to constitute the taking, but that inducements are sufficient.' *People v. Demousset*, 71 Cal. 611, 12 Pac. 788. In the decision of courts generally, the word 'abduction' and the words 'taking away' are used as the equivalent of each other, as we think they in fact are. We are unwilling to impute to the legislature any intention to give to the husband a right of action for the abduction of his wife, under clause 2 of section 49 of the civil code, of which the wife is deprived by the phraseology of clause 1. The abduction meant in both clauses, we think, should be held to be the same." The construction of the California court meets our approval. It is true that the word "abduction," according to the meaning given—and that is its usual meaning—includes a taking by enticement, and therefore the use of the word "enticement" in subdivision 2 was unnecessary. It is more proper, however, to treat it as a redundancy of expression, than to restrict the common meaning of the word "abduction," and thus defeat the legislative intent, which was to place a wronged wife upon the same footing as her husband. This view is strengthened to some extent by the note subjoined to subdivision 1 by the Field code commission, which originated it. We are of opinion that the wrong complained of is a legal wrong, and that an action by the wronged wife is maintainable under the statutes of this state.

The refusal of the trial court to give the following instruction is assigned as error: "Under the laws of the state of Wisconsin the plaintiff would not be permitted to maintain this action against the defendant. Therefore, if you find that the acts were done by the defendant, of which she complains, but that they were done within the state of Wisconsin, your verdict must be for the defendant." The refusal of this request was not error. It is agreed that "the actionable wrong is the abandonment of the wife by the husband, from the improper influences of the defendant, and that mere ineffectual attempt to alienate do not constitute actionable wrong, and that therefore the crucial question in this case is, where did plaintiff's husband abandon her because of the unlawful acts of the defendant?" The contention of appellant's counsel is that the abandonment of plaintiff by her husband might have taken place in the state of Wisconsin, and that "the court committed reversible error in not leaving the question to the jury, as a question of fact, whether the abandonment took place in that state or in some other state." This question was fully covered by the charge given. The right to recover was expressly limited to an alienation and abandonment consummated either in the state of North Dakota or Minnesota by the following instruction: "The great question for you to decide is, did Mrs. Hanson, knowing that Mr. King was a married man, wrongfully alienate or entice away the affections of Mr. King from his wife, and did she wrongfully and knowingly deprive Mrs. King of the comfort, society, support, love and affection of her husband, and was this done by Mrs. Hanson either in the state of North Dakota or Minnesota?" The substance of the language just quoted was reiterated in at least nine places in the charge. But, had this portion of the charge been wholly omitted, it would not have been error, for the reason that the tort in this case, under the undisputed testimony, was consummated in the state of Minnesota. The King family resided in Minnesota, and there is no pretense that Mr. King ever established, or attempted to establish, a home in Wisconsin or elsewhere. It stands uncontradicted that the plaintiff was abandoned in Minnesota.

Appellant also complains of the court's instruction with reference to a certain letter which purports to have been written by the plaintiff to her husband. The letter in question was offered by the defendant as an admission by plaintiff that prior to the time the defendant made the acquaintance of her husband the latter had lost

his affection for his wife, had supported her but indifferently, and had had improper relations with other women. The letter was admitted over plaintiff's objection that it was a confidential communication between husband and wife and was privileged. It appears that in June, following plaintiff's abandonment by her husband, the plaintiff went to Rice Lake, Wis., and called at the hotel which was operated by defendant and King, for the purpose of inducing her husband to leave the defendant, and return and live with her in Minneapolis. Her mission was fruitless, however, for, upon receiving information of her coming, he left for an adjoining town, and defendant gave her the indefinite information that he had gone South. The plaintiff testified that before returning to Minneapolis she wrote a note to her husband, sealed it, and gave it to a boy at the hotel, to be delivered to her husband upon his return. Defendant states that the plaintiff wrote a letter to her husband, read it to her before sealing it, and left it with her for delivery; that she delivered the same to King upon his return; and that she had not seen it since, until offered at the trial. Plaintiff testified that this is not the letter which she left at the hotel, that she did not write this letter, and that she did not read to the plaintiff the note which she left at the hotel. The instruction complained of is as follows: "I have admitted a letter claimed to have been written by Mrs. King to her husband at the hotel at Rice Lake, Wisconsin. You will first consider whether the letter (Exhibit 10) referred to is the identical letter written by Mrs. King to her husband, and, if you decide that it is the letter so written by Mrs. King to her husband, you will then consider the question as to whether Mrs. King read such letter to Mrs. Hanson or not. If you decide that it is the letter written by Mrs. King to her husband, and that it was read by Mrs. King to Mrs. Hanson, then you will consider the contents of said letter for the purpose of throwing light into your minds as to the relations existing between Mrs. King and her husband, and as to whether the acts of Mrs. Hanson caused an alienation of the affections of Mr. King from his wife, and caused him to desert and fail to support his wife. If, however, the jury should decide, upon an examination of the evidence, that the letter is not the letter written by Mrs. King to her husband at Rice Lake, or should decide that the letter was not read by Mrs. King to Mrs. Hanson at Rice Lake, then the jury should not consider the letter for any purpose. If this letter was not read by Mrs. King to Mrs. Hanson in the hotel

at Rice Lake, and if the jury should so find from the evidence, then the letter was a privileged communication made by the wife to the husband, and it should not be considered in evidence in that case." Is the foregoing instruction erroneous? We are of opinion that it is not. There can be no doubt that this letter, if the plaintiff wrote it, was a confidential communication from the plaintiff to her husband, and, as such, was privileged, and for that reason improper to be considered by the jury, unless the privilege was waived. So, too, it could have no evidentiary effect if the plaintiff did not write it. The trial court was of opinion that if it was read to the defendant, as she claims, it lost its privileged character. Whether this alone would amount to a waiver, we do not decide, for, if it would not, then the admission of the letter was error against the plaintiff, and wholly favorable to the defendant. There being some evidence that plaintiff wrote the letter, and that she read it to the defendant, the court admitted it in evidence, and submitted the controverted question of the writing and reading to the jury for determination, and instructed them to disregard it if it was not written by plaintiff, and also to disregard it if it was written by her, but was not read to the defendant, but otherwise to give it such weight as it was entitled to. This instruction was, in our opinion, entirely proper. It requires no citation of authority to show that the preliminary question of the admissibility of evidence is for the court, and that this often requires the determination of disputed fact affecting that question. But we do not understand that the court is obliged in every instance to determine the disputed questions of fact. The rule which meets our approval—and it is one entirely consistent with the separate functions of judge and jury, and is adapted to sound practice—is that, when the question of admissibility rests upon disputed facts, the court may submit the evidence to the jury, with proper hypothetical instructions. This rule is stated in 1 Greenleaf on Ev. (16th Ed.) section 81e, as follows: "In trials by jury, it is the province of the presiding judge to determine all questions on the admissibility of evidence to the jury, as well as to instruct them in the rules of law by which it is to be weighed. * * * If the decision of the question of admissibility depends on the decision of other questions of fact, such as the fact of interest, for example, or the execution of a deed, these preliminary questions of fact are in the first instance to be tried by the judge, though he may, at his discretion, take the opinion of the jury upon them. But where the

question is mixed, consisting of law and fact so intimately blended as not to be easily susceptible of separate decision, it is submitted to the jury, who are first instructed by the judge on the principles and rules of law by which they will be governed in finding a verdict; and these instructions they are bound to follow." This rule was applied in *Hartford Fire Ins. Co. v. Reynolds*, 36 Mich. 502, to the testimony of an attorney which it was claimed was privileged. The court said: "We do not think it improper to leave to the jury the question of the existence of such a relation, when disputed. The judge may determine, upon the statements of a witness himself, whether he is competent or not, but it does not properly belong to a judge to decide upon the truth of matters which have come out during the examination of witnesses who conflict. And it has been held that on an intricate question of fact the jury very properly be consulted. 1 Edw. Ph. Ev. 4. We understand this to be correct practice, and in many cases to be the only safe rule for determining such questions. It is laid down very plainly by Greenleaf. 1 Gr. Ev. sections 49, 425." Some courts approve the practice, where it is allowable, of taking a special verdict upon the disputed questions of fact. This, however, seems optional with the court. In *State v. Patterson*, 68 Me. 473, it was said that "the court may first inform the jury as to the law, or the jury may first inform the court as to the facts, as may be most practicable." See cases cited in opinion; also *Bartlett v. Hoyt*, 33 N. H. 151; *Festerman v. Parker*, 32 N. C. 474; *Silverthorn v. Fowle*, 49 N. C. 362; *Ross v. Gould*, 5 Greenl. 204; *Reynolds v. Richards*, 14 Pa. 205; *McNichol v. Pacific Express Co.*, 12 Mo. App. 407; *Stokes v. Johnson*, 57 N. Y. 673; *Coquillard v. Hovey*, 23 Neb. 627, 37 N. W. 479, 8 Am. St. Rep. 134; *Edwards v. Goldsmith*, 16 Pa. 43; *Boyce v. Martin*, 46 Mich. 239, 9 N. W. 265; 1 *Abbott's Trial Brief*, Civ. 459; *Curtis v. Martz*, 14 Mich. 512; *Cunningham v. Washburn*, 119 Mass. 227; *State v. Haynes*, 7 N. D. 356, 75 N. W. 267; 11 *Enc. Pl. & Pr* 87, and cases cited in note 1; 1 *Jones on Ev.*, section 172. The most practicable method, in our opinion, was that adopted by the trial court in this case and the same meets our full approval.

Appellant further complains of the instructions of the court, in this: that "the court erred in singling out the testimony of Mr. Davis, one of defendant's attorneys, by language practically throwing discredit thereon." The record furnishes no foundation for this criticism. H. G. Middaugh, one of plaintiff's attorneys, testi-

fied on behalf of his client. Mr. Davis testified on behalf of the defendant. The court did not name either of these witnesses in its instructions. Neither was their testimony stated or commented upon. The court instructed the jury that "an attorney is a competent witness for his client on the trial of a case, and the testimony of such a witness shall not be disregarded by you simply because the witness is an attorney testifying in favor of his own client. In such a case you are the judges of the weight and credit to which such testimony is entitled." The additional instructions on this subject did not establish any different standard for weighing the testimony of an attorney than is applicable to other witnesses.

It is urged that "the court erred in excluding, on its own motion, from the court room, while Mrs. King was testifying, the witness Grace Dickinson, the sister of defendant." The order complained of was made during the examination of Mrs. King, the first witness in the case, and required "all witnesses except the plaintiff and the defendant in this case to retire from the court room:" the court stating, in response to objection of defendant's counsel, that "the order applied on both sides of this case with equal impartiality." This was a matter lying within the discretion of the trial judge. It is said that the great object of examining witnesses is to elicit the truth, and the rule is that, "if the judge deems it essential to the discovery of truth that the witnesses should be examined out of the hearing of each other, he will so order it. (The process is termed, in many American courts, 'putting under the rule,' but a better term seems 'sequestration.')

* * *

The ordinary witness may always be subjected to this safeguard. It is not necessary that all should be excluded. The court has discretion to exclude some, and to allow others to remain." See 1 Greenleaf on Ev. (16th Ed.) sections 431, 432, and cases cited. In this case the order of exclusion was general, and there was no abuse of discretion.

Evidence was offered, over defendant's objection, tending to show that when King abandoned his wife in Minneapolis, and accompanied the defendant to Rice Lake, Wis., he lived with her there in adultery. It is contended that this evidence had no tendency to throw light upon their prior relations in Minnesota and North Dakota, and was of a highly prejudicial character. It cannot be doubted that this evidence was damaging to the defendant. It was, in our opinion, however, entirely competent. The circumstance that defendant took King with her to Wisconsin, and kept him at her

hotel after the plaintiff had protested to her in Minneapolis against it, and against the defendant's relation with her husband, and the evidence of their adulterous relations in Wisconsin, were valuable aids in determining what their relations had been in this state and in Minnesota, and tended strongly to show that the defendant was the moving cause in King's abandonment of his wife. The following language of the court in *Romaine v. Decker*, 43 N. Y. Supp. 79, 11 App. Div. 20, is appropriate to this case: "Carnal intercourse may be—nay, generally is—the greatest of enticements and allurements. * * * We have a notion that a woman's voluntary gift of her person to a man may be regarded certainly as great an evidence of illicit affection or love as anything she might say. In the case of a common strumpet, plying her vocation, and dealing with a husband on strictly a pecuniary basis, it may be that she cannot be properly charged with inducing or alluring the man away. So, too, in the present case, if carnal relations were established between the plaintiff's husband and the defendant, it would be competent for the defendant to show that she was the party least at fault, and that it was she who had yielded through the blandishments and seductive arts of the man, not he through her solicitation. But we think that when it has been shown that the husband abandons his wife, and remains away from her, and it is also proved that during the period of such abandonment he is maintaining improper relations with another woman, it will ordinarily be a question of fact for the jury to determine whether the meretricious favors accorded by the mistress are not an inducing cause to the desertion of the wife."

Neither did the court err in admitting evidence of defendant's wealth. Under the pleadings and evidence, the case presented a question to the jury, not only of compensatory, but of punitive, damages. The rule, resting upon the great weight of judicial opinion and upon sound reason, is that, in actions wherein exemplary damages are allowable, it is proper to admit evidence of the defendant's wealth. The rule and the reasons on which it is based are stated in 1 *Joyce on Damages*, section 144, as follows: "In those cases where exemplary damages may be recovered, it is proper to receive evidence as to the financial condition of the defendant. The plaintiff may introduce evidence showing the wealth of the defendant, so as to enable the jury to determine what damages shall be assessed against him as a punishment, for what might be a severe and exces-

sive punishment to a person of little or no wealth might, on the other hand, be very inadequate when awarded against one whose financial standing is high. As such evidence is admissible in behalf of the plaintiff, so, likewise, the defendant may show that he is poor, or a man of little wealth, so that an excessive amount may not be awarded." See cases cited in note; also 1 Sedgwick on Damages, section 405, and cases cited.

As to the further contention that "it was error for the court, in the midst of the trial, to punish defendant's leading and practically sole counsel in the case for contempt, and deprive her of his assistance for a time during the trial," it is sufficient to say that this question is not before us for review. True, the appellant specified in her notice of intention to move for a new trial that one of the grounds of her motion would be "irregularity in the proceedings of the court and adverse party, and for abuse of discretion by the court, by which the defendant was prevented from having a fair trial." But she did not follow it up. The grounds thus specified constitute part of the causes enumerated in subdivision 1 of section 5472, Rev. Codes 1899, as grounds for new trial. Section 5473, Rev. Codes 1899, requires that an application for a new trial, for causes stated in subdivision 1 of section 5472, "must be upon affidavit." No affidavits were served or filed, and this ground must therefore be deemed to have been abandoned. It is proper to say, however, that the jury were not present when the contempt proceedings occurred, and we are unable to see from the record how the defendant's case was prejudiced by the brief absence of one of her counsel. Upon the merits of the order, it is not proper to express an opinion. If it was erroneous, the party aggrieved thereby has his remedy by an independent appeal.

The questions already considered dispose of the assignments chiefly relied upon. Those not considered have been examined and found to be without merit.

The order appealed from will be affirmed. All concur.

Justices MORGAN and COCHRANE did not sit in the above case, or take any part in the decision; Judge C. J. FISK, of the First Judicial District, and Judge S. L. GLASPELL, of the Fifth Judicial District, sitting in their place by request.

(99 N. W. 1085.)

LOUIS KASTER v. HENRY C. MASON AND JULIA D. MASON.

Opinion filed May 9, 1904.

Specific Performance — Consideration — Mutual Assent.

1. Equity will not decree specific performance of a writing which lacks two essential elements of a contract, viz., consideration, and mutual assent of the signers to all the terms of the writing.

Contract — Compelling Signature — Reformation of Writing.

2. Where a writing, as a whole, does not purport to be a contract between two or more persons, but recites a dealing of the signer with himself, the court, on parol proof, will not require the owners of the land described in the writing to sign the same, and then decree a specific performance of the writing as reformed.

Appeal from District Court, Sargent county; *Lauder, J.*

Action by Louis Kaster against Henry C. Mason and Julia D. Mason. Judgment for defendants and plaintiff appeals.

Affirmed.

J. E. Bishop and *A. B. Kaercher*, for appellant.

Burden of showing lack of consideration lies with him who assails the instrument; the recital of a consideration therein is prima facie evidence of its existence. Rev. Codes 1899, sections 3880, 3881; 6 Am. & Eng. Enc. of Law, 765; want of consideration must be pleaded. 4 Enc. Pl. & Pr. 746.

Want of consideration not being pleaded, no proof could be offered by respondent, nor could he avail himself of evidence disclosed by appellant on this point. *Cardoze v. Swift*, 113 Mass. 250; *Illstad v. Anderson*, 2 N. D. 167, 49 N. W. 659; *Atchison & N. R. Co. v. Miller*, 21 N. W. 451.

Inadequacy of consideration is no defense unless so gross as to amount to conclusive evidence of fraud. 22 Am. & Eng. Enc. of Law (1st Ed.) 1031; 14 Id. (2nd Ed.) 516.

Silence without excuse or explanation will amount to ratification. 1 Am. & Eng. Enc. of Law (2nd Ed.) 1203.

Where an agent executes for his principal a written contract for the sale of land, and the latter ratifies it with full knowledge of its terms, such ratification renders the contract as valid as if the agent was previously employed in writing. *Townsend v. Kennedy*, 60 N. W. (S. D.) 164.

Suit for specific performance is of exclusive equity jurisdiction, regardless of absence or inadequacy of legal remedy. Suitor has his choice of remedies. 6 Ballards' Law of Real Property, section 838; 22 Am. & Eng. Enc. of Law (1st Ed.) 914. Equity assumes jurisdiction over all manner of rights and interests connected with real estate. 22 Am. & Eng. Enc. of Law (1st Ed.) 941, also 912-13. 6 Bullard's Law of Real Property, 831. Refusal to execute contract makes tender and demand unnecessary. *McPherson v. Fargo*, 74 N. W. 1057; Bullard's Law of Real Property, 692

Statute of frauds must be pleaded, or it is not available as a defense. 9 Enc. Pl. & Pr. 713. If one refuses a deed on account of defective title, he may still enforce the contract. *Oliver Min. Co. v. Clark*, 71 N. W. 908.

E. W. Bowen and Chas. E. Wolfe, for respondents.

Respondents never signed Exhibit "A." The signatures are a forgery. If such contract were signed, it is without consideration. A contract to be specifically performed must be upon a valuable consideration. 3 Pom. Eq. Jur. 1405.

Lack of consideration was pleaded. Consideration was alleged in complaint and denied in the answer. The denial was general; respondents could not plead affirmatively a lack of consideration in an instrument that they claim they never signed or approved.

The plaintiff has adequate remedy at law. The contract, if it existed and is valid, provides for \$100 damages, as fixed by appellant.

There must be mutual assent both in law and equity. If there was no consensus, it is immaterial what was written.

COCHRANE, J. Plaintiff sued for the specific enforcement of the following writing known and identified as "Exhibit A," to wit:

"Earnest Money Contract of Sale. Cogswell, North Dakota, January 27, 1902. Received by Louis Kaster One Hundred (\$100) Dollars as earnest money and in part payment for the purchase of the following described property situated in the county of Sargent and State of North Dakota, viz: Southwest $\frac{1}{4}$ of Section 18, Township 131, Range 56, and the East $\frac{1}{2}$ of Southeast $\frac{1}{4}$, Section 13, Township 131, Range 57, which we have this day, through Frankson & Kavanaugh, our authorized agents, sold and agreed to convey to said Louis Kaster for the sum of two thousand eight hundred and eighty (\$2,880) Dollars, on terms as follows, viz: \$100

in hand paid as above, and \$2,780, March 27, 1902, less mortgage that is now on the place of \$640, payable on or before the dates first named above, or as soon thereafter as a warranty deed conveying a good title to such land is tendered, time being considered of the essence of this contract and this sale subject to the approval of Thomas Frankson, of Spring Valley, Minnesota,—\$20 less for expenses. And it is agreed that if the title to said premises is not good, and cannot be made good within sixty days from date hereof, this agreement shall be void and the above \$100 refunded. But if the title to said premises is now good in grantors named, and warranty deed tendered within sixty days and the said purchaser refuses to accept the same, said \$100 shall be forfeited to the said Frankson & Kavanaugh; but it is agreed and understood by all parties to this agreement that said forfeiture shall in no way affect the rights of either party to enforce the specific performance of this contract.

“LOUIS KASTER. [Seal.]

“By KAVANAUGH, Agent.

“I hereby agree to purchase the said property for the price and upon the terms above mentioned, and also agree to the conditions of forfeiture and all conditions therein expressed.

LOUIS KASTER. [Seal.]

“We the undersigned owners of the above described land, do hereby ratify the above sale and agreements.

“Mrs. JULIA D. MASON. [Seal.]

“HENRY C. MASON.

“Witness:

“WM. KAVANAUGH.”

Upon a trial to the court without a jury, judgment went for the defendants. The case is before us for trial anew, pursuant to section 5630, Rev. Codes 1899.

William Kavanaugh, one of the firm of Frankson & Kavanaugh, ascertained that defendants offered their farm for sale at \$10 per acre. On the same day, January 27, 1902, without any authority whatever from the defendants to act for them, and without their knowledge or consent, Kavanaugh exhibited the land in controversy to Kaster, the plaintiff, and then prepared and procured the signature of the plaintiff to the foregoing writing, above the words “By Kavanaugh, Agent,” and also after the clause following the above words. Kaster paid to Kavanaugh \$100 at the time he signed the

paper. On the following day Kavanaugh went to the defendants' farm with his writing in his pocket. Without informing defendants of his deal with Kaster, he negotiated with them for, and secured from them, a written option to purchase their farm, whereby, for \$50 then paid, they agreed that Frankson & Kavanaugh should, for 14 days after said January 28th, have the option of purchasing the described lands for \$2,400 in cash, less a mortgage on the farm of \$640, Frankson & Kavanaugh to signify their intention to take or reject the land by notice in writing within 14 days. If the notice of their intention to purchase was not served within 14 days, all rights of Frankson & Kavanaugh under the contract were to ipso facto cease, and if the notice of intention to purchase was served within 14 days, then they were to have 60 days further in which to examine abstract, make deeds, and close deal. After this option was agreed upon and written, it was signed by each of the defendants and delivered by them to Kavanaugh, and at their request a copy of it was made by Kavanaugh and given to them. After this matter was fully closed and Kavanaugh had secured the option contract, he told defendants that he had already sold their land to another, and, upon Mr. Mason's saying that was all right, Kavanaugh testified that he produced Exhibit A, read it to the defendants, and asked them to sign their names to the clause, "We, the undersigned, owners of the above described land, do hereby ratify the above sale and agreements," and that they each affixed their names thereto in his presence. Defendants admit that Kavanaugh told them, after he had secured the written option, that he had sold the land, and that he read to them what he represented to be the contract of sale, but that they were not asked to, or did they in fact, sign the same; that they did not read Exhibit A, and knew nothing of its contents excepting as read to them by Kavanaugh.

The trial judge made the following findings of fact, which are challenged by appellant, viz.: "That the signatures of the defendants at the bottom of said contract, Exhibit A, are the genuine signatures of said defendants, but that they neither knew they were signing the said contract, nor assented thereto by such signatures, but that their signatures thereto were procured without their knowledge that they were signing said contract, and without their assent thereto." Also, "That the defendants received no part of the money consideration named in Exhibit A, and that there was in fact no consideration for the execution of said instrument passing from the

plaintiff to the defendants.” And the court found as a conclusion of law that the writing, Exhibit A, declared upon in the complaint, was not the contract of defendants, because lacking their assent thereto, and it was not such a contract as in equity and good conscience ought to be decreed to be specifically performed by the defendants. The evidence sustains these findings and this conclusion. However their names were secured to Exhibit A (and the evidence is not clear upon this point), it is clear that the defendants did not sign the same intending to assume, or understanding that they thereby assumed, contract relations with Kaster. Defendants understood at all times that they were dealing with Frankson & Kavanaugh, and at no time considered that they were either bound or benefited by the Kaster deal, which they looked upon as an independent arrangement between Frankson & Kavanaugh and the plaintiff, entirely ancillary and subject to the rights of Frankson & Kavanaugh under the option contract. Frankson & Kavanaugh did not give the notice of election to purchase the land, as stipulated in the option contract, and forfeited all rights thereunder. The minds of the parties never having met upon its terms, Exhibit A never became a contract. Section 3856, Rev. Codes 1899; 3 Pom. Eq. section 1293; Pom. Spec. Per., section 58; 28 Enc. L. 21, and note. But the writing upon which plaintiff bases his right of recovery, in the form in which it was before the signatures of defendants were attached, was not a contract, and did not on its face purport to be a contract—it lacked the parties. The names of the defendants were neither recited in it nor signed to it. It did not purport to be made by any one in their name or behalf. It recited a transaction of Kaster with himself. It was like the writing sued upon in *Canterberry v. Miller*, 76 Ill. 355, which the court held was not an enforceable contract. When defendants signed the paragraph: “We, * * * do hereby ratify the above sale and agreements,” they did not, by signing, supply the wanting parties and make this their contract, because the writing above did not constitute a sale or agreement, and their ratification of Kaster’s promise to buy from himself the described lands and to pay himself the specified sum therefor did not convert this into a promise on the part of defendants to sell their land to Kaster at the price named.

Plaintiff, in his complaint, alleges: “That in the execution of said contract on the part of defendants by their agents, Frankson & Kavanaugh, the said Kavanaugh, who acted for said agents in the

signing of said contract for defendants, by reason of inadvertence and oversight failed to attach to said contract, in a blank space left therein, the names of said defendants, but he, by inadvertence and oversight, placed in said blank space the name of the plaintiff, Louis Kaster." Plaintiff asks that the contract be reformed by adding the signatures of Henry C. Mason and Julia D. Mason, and specifically enforced after being so reformed. The evidence does not show this averment to be true, but disproves it in this: Kavanaugh did not sign Kaster's name to the writing. The signatures are Kaster's own, and, as already stated, Frankson & Kavanaugh were not, either by appointment or ratification, the agents of defendants, and had no authority at any time to represent them in any way. An all-sufficient answer to this request for reformation of the writing was given in *Kulberg v. Georgia*, 10 N. D. 463, 88 N. W. 88, that "a court of equity will not compel parties to sign contracts and then decree specific performance of them." Had Frankson & Kavanaugh signed defendants' names to this writing by themselves as agents, assuming an authority which they did not in fact possess, it would have been competent for defendants subsequently, with full knowledge of the facts, to ratify the act, or to adopt it as their own, and thus become bound. *Clough v. Clough*, 73 Me. 487, 40 Am. Rep. 386; *Town v. Cooper* (Conn.) 30 Atl. 760. But the writing in suit did not purport to be signed by defendants, or by any one as their agents, so there was nothing for them to ratify. They did not in fact ratify or adopt it.

The judgment appealed from is affirmed. All concur.
(99 N. W. 1083.)

THE ROBERTSON LUMBER COMPANY V. ANDREW H. JONES.

Opinion filed May 10, 1904.

An Order Granting a Change of Venue Is an Appealable Order.

1. An order granting a change of venue in a civil action "involves the merits," and is appealable, under subdivision 4 of section 5626, Rev. Codes 1899, which provides that an order is appealable "when it involves the merits of an action or some part thereof."

Change of Venue — Showing Sufficient.

2. Plaintiff applied for a change of place of trial for the convenience of witnesses, basing his application upon the files in the case

and upon an affidavit of its managing agent, which stated the names of the witnesses, their residence, and that they were necessary witnesses, which statements were not controverted by defendant. It is *held* that a sufficient showing was made to authorize an order changing the venue, and that the court did not abuse its discretion in making such order.

Appeal from District Court, Pierce county, *Cowan*, J.

Action by the Robertson Lumber Company against Andrew H. Jones. Judgment for plaintiff and defendant appeals.

Affirmed.

Tracy R. Bangs, for appellant.

Defendant has a legal right to have his case tried in the county of his residence, unless some of the statutory grounds for a removal exist; and no showing is made that the convenience of witnesses demands a change of place of trial. The discretion to be exercised by the court in ordering such change is a legal one to be exercised only upon a sufficient showing.

Affidavits should show how the witnesses are material and what facts they will prove, so the court may judge of the materiality of their testimony. *Cook v. Pendergast*, 61 Cal. 72; *Am. Ex. Bank v. Hill*, 22 How. Pr. 29; *People v. Hayes*, 7 How. Pr. 248; *Bushnell v. Durant*, 31 N. Y. S. 608; *Lane v. Bochlowitz*, 78 N. Y. S. 1072; *Bennett v. Weed*, 77 N. Y. S. 864.

An order for change of venue is an appealable order. *White v. C. M. & St. P. R. Co.*, 41 N. W. 720, 9 L. R. A. 824; *Russell v. Whitcomb*, 85 N. W. 860 (S. D.); *Bolton v. Donovan*, 9 N. D. 575, 84 N. W. 357.

Bosard & Bosard, for respondent.

The court can change the place of trial on the grounds of the convenience of witnesses. *Challoner v. Boyington*, 56 N. W. 640 (Wis.); *Jenkins v. California Stage Co.*, 22 Cal. 538; *Thompson v. Brant*, 32 Pac. 890; *Wiggins v. Phelps*, 10 Hun. 187; *Gorman v. South Boston Iron Co.*, 32 Hun. 71; *Lyon v. Davis*, 7 N. Y. S. 564; *Dunn v. Louis*, 19 N. Y. S. 755.

In the absence of a showing of materiality of witnesses, or challenge by opposing party as to their materiality, or other cause moving the court, party having the greatest number of witnesses will probably prevail on motion for change of venue. *Sherwood v. Steele*, 12 Wend. 295; *Hull v. Hull*, 1 Hill (N. Y.) 671.

An application for a change of place of trial which fails to show materiality of the testimony of witnesses is sufficient, if opposing party presents no affidavit as to witnesses. *People v. Hayes*, 7 How. Pr. 248; *Brown v. Peck*, 10 Wend. 569.

The order changing place of trial is not appealable. While *White v. Chicago Ry. Co.*, 5 Dak. 508, so holds, the decision is based on the fact that Wisconsin had a similar law, adopted in 1860, which we appropriated in 1887, and under such law as construed in Wisconsin such orders were appealable. Yet Iowa adopted such law in 1851, re-enacted it in 1873, and the supreme court of that state held it was not appealable. *Allerton v. Elridge*, 10 N. W. 252; *Graves v. Richmond*, 12 N. W. 80; *Horak v. Horak*, 25 N. W. 924.

A distinction exists between cases where a change is granted, and those were refused. *Juan v. Goldsby*, 6 Cal. 440.

Orders granting change are not appealable in New York. *Fisk v. R. R. Co.*, 41 How. Pr. 365.

YOUNG, C. J. The defendant appeals from an order changing the place of trial of this action from Pierce county to Grand Forks county. The venue was originally laid in the latter county. Upon defendant's application the case was transferred to Pierce county, which is the county of the defendant's residence. Thereafter the plaintiff applied for and secured the order transferring the case to Grand Forks county, from which this appeal is taken.

Counsel for respondent contend that an order changing the venue of an action is not appealable, and that this appeal should therefore be dismissed. This question was passed upon by the supreme court of the territory in the case of *White v. C. M. & St. P. Ry. Co.*, 5 Dak. 508, 41 N. W. 730, and adversely to the respondent's contention. The statute under which such orders were held appealable—section 5236, Comp. Laws—is still in force in this state. Subdivision 4 of section 5626, Rev. Codes 1899, is the same as subdivision 4 of section 5236, Comp. Laws, and reads as follows: "The following orders when made by the court may be carried to the supreme court: * * * (4) When it involves the merits of an action or some part thereof." It was held in the case just cited that an order changing the venue "involves the merits" within the meaning of this subdivision, and is therefore appealable. In reaching this conclusion the court followed the decisions of the supreme court of Wisconsin construing a statute identical in language, and assumed that

our statute was adopted from that state with the construction which had been theretofore given to it in the following cases: *Western Bank v. Tallman*, 15 Wis. 92; *Haas v. Weinhagen*, 30 Wis. 326; *Schattschneider v. Johnson*, 39 Wis. 387. The construction of the territorial supreme court was approved in South Dakota in *Russell v. Whitcomb*, 14 S. D. 426, 85 N. W. 860, and is within the reasoning of our own court in *Bolton v. Donavan*, 9 N. D. 575, 84 N. W. 357. A number of cases from Iowa are cited which hold that such orders are not appealable. *Allerton v. Eldridge*, 56 Iowa, 709, 10 N. W. 252; *Groves v. Richmond*, 58 Iowa, 57, 12 N. W. 80; *Horak v. Horak*, 68 Iowa, 49, 25 N. W. 924. The Iowa statute in force when the above cases were decided contained the same provision as subdivision 4 of section 5626, *supra*, but an examination of the cases will show that the court had under consideration other subdivisions, and that the provision contained in subdivision 4 was not considered. No sufficient reasons are advanced for departing from the construction of the territorial court. It is approved by our sister state, and its correctness has not been challenged up to this time in this state. Further, as already stated, it is entirely within the reasoning of this court in *Bolton v. Donavan*, *supra*.

The order appealed from in this case was made for the convenience of witnesses, and under the authority of section 5244, Rev. Codes 1899, which relates to change of place of trial of civil actions and provides that "the court may change the place of trial in the following cases: * * * (3) Where the convenience of witnesses and the ends of justice would be promoted by the change." It will readily appear from a brief statement of the facts that the order in question must be affirmed. The complaint states a cause of action upon an account. The answer contains a general plea of payment, which, in legal effect, is an admission of the plaintiff's cause of action and a tender of the only issue in the case, namely, payment. Prior to making the application for a change of venue, the plaintiff made a written demand upon the defendant and his counsel for a statement of the items of his alleged payment, the dates of payment, and names of persons to whom payment was made. This was not furnished. The application was based upon the files in the case and the affidavit of one Alvin Robertson. The affidavit states that: "The lumber and materials included in the account sued upon were sold to defendant in Minto in the county of Walsh; that the local books in which said accounts have been kept are now in the office

of the defendant in Minto; that the general books of the plaintiff, which are material in the trial of the action, are kept in Grand Forks; that all the witnesses to be called on the part of the plaintiff live either at Grand Forks or at Minto, and the deponent is informed and believes that no witnesses to said transaction whatever, except the defendant himself, reside in the county of Pierce; that the witnesses necessary to be called on the part of the plaintiff are George Robertson, who was in charge of the local office at Minto at the time of this transaction, A. C. Wonderlick, auditor of said company, and this affiant, the general manager of said company, all of whom reside in the city and county of Grand Forks." The record shows that at the hearing defendant was represented by counsel, but filed no affidavits controverting the statements contained in the above affidavit. It is manifest that on these facts the court did not abuse its discretion in granting the change. When an application of this character is made, "it is the duty of the court to look to the affidavits as well as the issues to be tried, and determine upon the entire showing made in which of the two courts a trial will be most accessible to the greatest number of witnesses whose personal attendance the parties may require and reasonably expect to obtain." *King v. Vanderbilt*, 7 How. Prac. 385; *Fletcher v. Church*, 11 S. D. 537, 78 N. W. 947. True, the affidavit does not show what the several witnesses will testify to, so that the court can determine the materiality of their testimony from an inspection. But the defendant is not in a position to question the sufficiency of the affidavit in this particular. As we have seen, he failed, after demand, to furnish the plaintiff the information which it was necessary for the plaintiff to have in order to make a more specific affidavit. Neither did he at the time of the hearing deny the statement contained in plaintiff's affidavit that the three witnesses who resided in Grand Forks county were necessary witnesses, or controvert the fact that the plaintiff had but one witness in Pierce county. His failure to deny that the witnesses named were necessary was, in effect, an admission that their testimony would be material. *Cartright v. Town of Belmont*, 58 Wis. 370, 17 N. W. 237; *State v. Mooney*, 10 Iowa, 506; *Brown v. Peck*, 10 Wend. 570; *Scott v. Gibbs*, 2 Johns. Cas. 116. In the absence of a counter showing, the plaintiff's affidavit was sufficient, and the order changing the venue was properly granted.

Order affirmed. All concur.

(99 N. W. 1082.)

JOHN PEWONKA, A MINOR, BY FRANK PEWONKA, GUARDIAN AD LITEM, v. ALEX STEWART.

Opinion filed May 12, 1904.

Negligent Obstruction of Highway — Liability for Damages.

1. A person negligently obstructing a highway, causing an injury to a person traveling on such highway in the nighttime without fault or negligence, said highway having been regularly traveled by the public for years, cannot defend against such negligence by proving that such highway was not legally established or traveled, nor upon the ground that such highway is upon the right of way of a railroad company.

Directed Verdict.

2. A verdict should not be directed when there is a substantial conflict in the evidence upon a material issue.

Appeal from District Court, Traill county; *Pollock, J.*

Action by John Pewonka, by Frank Pewonka, his guardian ad litem, against Alex Stewart. Judgment for defendant and plaintiff appeals.

Reversed.

W. J. Courtney and Morrill & Engerud, for appellant.

That a street or highway may become such by public use without dedication, is well established. *Mason v. Sioux Falls*, 51 N. W. 770; (S. D.); *Coulter v. Great Northern Ry. Co.*, 5 N. D. 568, 67 N. W. 1046; *Walcott Tp. v. Skauge*, 6 N. D. 382, 71 N. W. 544.

As to whether a given obstruction in a street renders it unsafe for public travel, is purely a question of fact which should be left to the jury. *Heckman v. Evenson*, 7 N. D. 173, 73 N. W. 427.

A case should never be taken from the jury when there is a controverted question of fact presented by the evidence. *Vickery v. Burton*, 6 N. D. 245, 69 N. W. 193; *McRae v. Hillsboro Nat. Bank*, 6 N. D. 353, 70 N. W. 813; *Pirie v. Gillett*, 2 N. D. 255, 50 N. W. 710; *Slattery v. Donnelly*, 1 N. D. 264, 47 N. W. 375; *Cameron v. Great Northern Ry. Co.*, 8 N. D. 125, 77 N. W. 1016.

Where one is injured by the joint agency or co-operation of several persons, all, who are in any manner connected with the wrongful act, are severally liable for such injury. *Doremus v. Root et al.*, 54 L. R. A. 649; *Cuddy v. Horn*, 10 N. W. 32; *Wyss v. Grunert*, 83 N. W. 1095; *Patterson v. Wabash, St. L. & P. Ry. Co.*, 19 N. W. 761.

John Carmody and William Barclay, for respondent.

Dedication of a public highway from use and implied consent must be based on a clear intent, and the acts and circumstances relied on to establish it must be unequivocal and convincing; and unless such intent can be found in the facts and circumstances of the particular case no dedication exists. *Morrison v. Marquardt*, 24 Iowa, 35; *Dillon Mun. Corp.* (4th Ed.) section 636; *Elliott on Roads and Streets*, 99.

There being no highway, plaintiff was a trespasser and defendant owed him no legal duty. Where there was no duty, there was no negligence. *Akers v. Chicago, St. P., M. & O. Ry. Co.*, 60 N. W. 669; *O'Leary v. Brooks Elevator Co.*, 7 N. D. 554, 75 N. W. 919, 47 L. R. A. 677.

Plaintiff was only a licensee on the premises and he accepts whatever peril he incurs in the use of such license. *Indiana, B. & W. R. Co. v. Barnhart*, 115 Ind. 399, 16 N. E. 121.

MORGAN, J. This is an action to recover damages on account of injuries received by the plaintiff through the alleged negligence of the defendant. The facts as developed at the trial are as follows: The plaintiff was driving over what is alleged in the complaint to be a public highway of the village of Galesburg, at 4 o'clock a. m. of November 21, 1902, and, while going home from a dance, ran against a post placed in the center of the traveled portion of the highway, and was thrown from his carriage and injured. The post was placed in the highway by the defendant, or some other person engaged in moving a schoolhouse over said highway. The placing of posts in the highway was necessary in order to move the schoolhouse in the manner in which it was being moved. The posts were placed in the highway about 90 feet in front of the schoolhouse, and were about 8 inches in diameter, and, as placed, were about 3 feet above the ground. The traveled part of the highway was about one rod in width, and its whole width about three rods at the point where the posts were. The highway had been traveled by the public generally for at least 16 years, and was traveled by persons coming to the village from the south, or in going therefrom in that direction. On the west side of the highway are grain elevators and lumber yards; on the east, stores and other buildings. It runs through the business portion of the village, and is traveled as much as any street of the village. On November 21st the schoolhouse was being

moved over this highway, and at the close of the work of moving it on that day was left in the street, without taking any precautions to warn travelers by signals of any kind that the posts and school house were in the highway. The leaving of these posts on the traveled highway without warning signals is the negligence charged against the defendant as the proximate cause of the plaintiff's injury and damage.

The defendant denies that he caused the injury, and claims that the plaintiff was not rightfully upon the highway at the time of the injury, for the reason that such highway was on the right of way of the Great Northern Railway Company, and, further, that plaintiff was injured in consequence of his own negligence at the time of the injury. The evidence shows that this highway was upon such right of way, but it does not show whether the whole of it is on such right of way or not. We shall treat the case as though the evidence showed that the whole of the highway at this point is upon the right of way. There is no evidence that any part of the street has ever been laid out as a highway. The evidence is undisputed, however, that it has been generally and continuously traveled by the public. At the close of the taking of testimony the district court directed a verdict for the defendant, and judgment was entered dismissing the action. The plaintiff has appealed from such judgment, and assigns as error the direction of a verdict for defendant. Defendant claims that plaintiff cannot recover for three reasons: (1) That the highway on which the injury occurred was not a legal highway, and that plaintiff was not rightfully thereon, because it was upon the right of way of the railway company; (2) that defendant was not in charge of the moving of the schoolhouse; and (3) that plaintiff was injured in consequence of his own contributory negligence.

We are satisfied that a verdict should not have been directed in defendant's favor upon either of the grounds mentioned. Relating to the ground first mentioned, it is undisputed that the highway had been used for travel by the public without interruption for over 16 years. It was used by pedestrians and for vehicles as much if not more than any street of the village. There is testimony in the record that the highway had been graded, but by whom is not stated. Without deciding what the relative rights of plaintiff and the railway company would have been in case the injury had been caused by the negligence of the company, we have no hesitation in holding that the defendant is liable for any injury to

the plaintiff caused by his negligence. The fact that the plaintiff was upon a highway not legally laid out or established cannot be a justification for his own negligence. That the highway was not legally laid out, and was upon the railway company's right of way, was in no manner the cause of the injury. That fact did not contribute in any way to the cause of the collision. It was not remotely or proximately the cause of the injury to the plaintiff. If the plaintiff be considered a licensee or a trespasser, the defendant must be considered the same. They were upon the highway with equal rights, and owed each other the same measure of duty and care. Before the fact that the highway in question had not been legally established as such can avail the defendant as a defense, plaintiff's injury must be shown to have been the result of that fact. To permit defendant to avail himself of that fact as a defense would be to allow as a defense that which was in no way responsible for the injury. If plaintiff was acting unlawfully or wrongfully or without authority, such fact was not the cause of the injury, and not connected with the injury, directly or indirectly, and cannot therefore, in law, be a defense to the defendant if the injury was caused by his own negligence. *Daltry v. Media Elec. Co. (Pa.)* 57 Atl. 833. In *Sutton v. Wauwatosa*, 29 Wis. 21, 28, 9 Am. Rep. 534, the court said: "And as to the other principle, that the act or conduct of the plaintiff which can be imputed to him as a fault, want of due care, or negligence on his part contributing to the injury, must have some connection with the injury as cause to effect, this also seems almost too clear to require thought or elaboration. To make good the defense on this ground, it must appear that a relation existed between the act or violation of law on the part of the plaintiff and the injury or accident of which he complains, and that relation must have been such as to have caused or helped to cause the injury or accident of which he complains, not in a remote or speculative sense, but in the natural and ordinary course of events, as one event is known to precede or follow another." If it be conceded, therefore, that the plaintiff was wrongfully or even unlawfully upon the highway at the time of the injury, it does not follow that the defendant can justify his own wrongful negligence through that fact, in a case where plaintiff's wrong did not contribute to the injury. A wrongful act on the plaintiff's part cannot be set off as against defendant's wrongful act of negligence. In *Norris v. Litchfield*, 35 N. H. 271, 69 Am. Dec. 546, the court said: "It is not enough, then, to show that

a party is a wrongdoer or a trespasser or a violator of the law, to defeat his action for damage sustained from the negligence of another. It must be shown that such act is a fault which has directly contributed to the loss or damage of which the party complains." Thompson on Negligence, vol. 1, section 82, and cases cited; Welch v. Wesson, 6 Gray (Mass.) 505; Steele v. Burkhardt, 104 Mass. 59, 6 Am. Rep. 191. The defendant had knowledge that the highway in question had been traveled by the public for years, and knew that it was then used for travel. If the leaving of the posts in the highway without any precautions taken to warn travelers of danger was negligence on the part of the defendant, and that likelihood of danger to travelers should reasonably have been foreseen, it was defendant's duty to guard against the danger, and failure to do so was negligence. Enc. Law, vol. 21, p. 486, and cases cited. The principle that persons must conduct themselves and use their property, and property under their control, so as not to be likely to injure others, applies in this case. Mayer v. Thompson-Hutchinson Company, 104 Ala. 611, 16 South. 620, 28 L. R. A. 433, 53 Am. St. Rep. 88; Baird v. Shipman, 132 Ill. 16, 23 N. E. 384, 7 L. R. A. 128, 22 Am. St. Rep. 504; Thompson on Negligence, vol. 1. section 694, and cases cited; Daltry v. Media Elec. Co., supra.

It is further insisted that defendant was not liable for the leaving of the posts in the highway without signals, and that he was not the person who set the posts in the highway. The evidence is conflicting upon the question as to who was in charge of the moving of the building. We do not think that the defendant's liability depends necessarily upon the question whether he performed the physical act of placing the posts in the ground. The setting of the posts in the ground was a necessary work in the moving of the building, and the setting of them was not necessarily a negligent act. It is the leaving of them in the highway without taking any steps to warn travelers of their presence there that is pleaded as the negligent act. If leaving them in that condition was negligence, it must be charged to the person or persons having charge of the work of moving the building. Whether he or they were present when so left, or had knowledge that it was so left, would be immaterial, as would it be that others assisted in the work. This would not excuse the defendant from fault if he was in charge of moving the building. He cannot escape liability on the ground that those employed by him to move the building were responsible for the negligence. There is

competent evidence in the record that defendant had charge of the moving of the building; that he directed the work of the men engaged in moving the building, and hired men to assist. There is also competent evidence that the moving of the building was in charge of others. Under such substantial conflict, it was a question for the jury to determine whether the defendant was guilty of the alleged negligent act or not, and taking the question away from the jury was error. *Shepard v. Hanson*, 10 N. D. 194, 86 N. W. 704, and cases cited.

It is, lastly, urged that the plaintiff was guilty of negligence that caused and contributed to the injury, and without which no injury would have occurred. The negligence attributed to him is that he had driven by the posts in question on the evening previous, and should have avoided them in the morning when he ran into them. He testifies that it was dark when he drove on the highway in the evening, and dark when he ran into them in the morning, and he further testifies that he drove on the west side of the highway on the previous evening. This does not constitute contributory negligence as a matter of law.

The judgment is reversed, a new trial granted, and the cause remanded for further proceedings according to law. All concur.
(99 N. W. 1080.)

NOTE—On the law of streets and highways, see a very valuable reporter's note by the late Judge Cochrane to *Hechman v. Evenson*, 7 N. D. 173.

STATE OF NORTH DAKOTA EX REL KELLY, STATE'S ATTORNEY V.
THEODORE B. NELSON, ED GARRITY AND HERBERT WANDER.

Opinion filed May 18, 1904.

Liquor Nuisance — Evidence of.

1. A nuisance, as defined by section 7605, Rev. Codes 1899, is a place where intoxicating liquor is sold, bartered, or given away in violation of law, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter, or delivery, in violation of law. It is not the selling or keeping for sale, or the resorting for the purpose of drinking, that constitutes the nuisance; but it is the keeping the place where any or all these things are done.

The Keeper of a Liquor Nuisance Must Be an Occupant.

2. To be the keeper of a liquor nuisance so as to subject the place to condemnation as such, the person must be an occupant under some claim of right, and not a mere transient and naked trespasser therein.

The Word "Place" Means the Particular Room, Tenement, or Apartment.

3. The word "place," as used in section 7605, Rev. Codes 1899, means the particular room, tenement, or apartment wherein the unlawful business is done or the liquor is kept for sale or sold.

Sales in Hotel Without Knowledge or Consent of Owner or Lessee, Does Not Render It a Nuisance — Place — Room Identified.

4. Where a boarder at a hotel kept intoxicating liquor in his bedroom, and on three or four occasions sold liquor to persons in the hotel, but without the knowledge or consent of the owner of the building, or of the lessees and proprietors thereof, the hotel could not be adjudged a common nuisance and closed as such; and the particular room or place where the liquor was kept or sold could only be adjudged a nuisance, and abated, upon its being particularly identified in the proofs, so that the decree for its abatement could point out the identical place, without interfering with the rooms and rights of others.

Identity Insufficient.

5. The place where the nuisance, if any, was maintained, was not sufficiently identified in this case so that a decree for its abatement could be made.

Finding of Intoxicants Evidence Only When Found by the Searching Officer With Proper Process.

6. The finding of intoxicating liquor on the premises occupied by defendant is prima facie evidence of the existence of a nuisance, under section 7605, Rev. Codes 1899, only when the liquor was found by an officer empowered to search for the same under a warrant issued in connection with the temporary injunctive order.

Equitable Action — Finding Liquor Not Presumptive Evidence of Keeping for Sale.

7. In an equitable action for the abatement of an alleged liquor nuisance, the finding of intoxicating liquor in possession of the defendant is not, under section 7614, Rev. Codes 1899, presumptive evidence that the same was kept for sale contrary to law.

Appeal from District Court, Nelson county; *Fisk, J.*

Action by the state, on the relation of George D. Kelly, as state's attorney, against Theodore B. Nelson and others, to abate a nuisance. Judgment for defendants and plaintiff appeals.

Affirmed.

George D. Kelly, state's attorney, for appellant. *M. A. Shirley*, for respondents.

If the nuisance existed in the particular place proceeded against, then such nuisance must be abated and its continuance enjoined, irrespective of any questions of title or ownership in the property harboring the nuisance. *State ex rel. Sheeks v. Hilliard*, 10 N. D. 436, 87 N. W. 980; *Commonwealth v. Hayes*, 45 N. E. 82; *State v. Lord*, 55 Pac. 503; *Carter v. Bartel*, 81 N. W. 462; *Gray v. Stienes*, 28 N. W. 475; *Nichols v. Thomas*, 56 N. W. 540; *Littleton v. Harris* 34 N. W. 800.

The joint answer interposed by defendants is a general denial merely, and puts in issue the existence or non-existence of the nuisance only. *Overton v. Schindele*, 50 N. W. 977; *Bliss on Code Pleading*, section 340.

No brief by respondents.

COCHRANE, J. This is an equitable action prosecuted by the state's attorney of Nelson county to have the Exchange Hotel, situated on lot 10 of block 12, in the village of Aneta. Nelson county, N. D., adjudged to be a common nuisance, and directing that it be shut up, abated and closed, and to enjoin the defendants from using or permitting such premises to be used for the keeping for sale or for the sale of intoxicating liquors, and plaintiff asks for costs and attorney's fees. The case is here for trial anew under section 5630, Rev. Codes 1899.

The complaint, after alleging the ownership of the property to be in the defendant Theodore B. Nelson, proceeds: "That the defendants, Ed Garrity, Theodor B. Nelson and Herbert Wander, now occupy the said real property, upon which there is a building, and there maintain a place where intoxicating liquors are sold, bartered and given away, in violation of the provisions of chapter 63 of the penal code, and where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, and where intoxicating liquors are kept for sale, barter or delivery, in violation of the provisions of chapter 63, and are now engaged in

maintaining upon said real property a common nuisance, and will continue to keep and maintain said common nuisance, unless restrained by an order of injunction of the court." A nuisance in this connection is defined by section 7605, Rev. Codes, to be a place "where intoxicating liquors are sold, bartered or given away in violation of any of the provisions of this chapter, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter or delivery in violation of this chapter; * * * and the owner or keeper thereof shall, upon conviction, be adjudged guilty of maintaining a common nuisance." In construing this statute, it has been repeatedly stated by this court that keeping intoxicating liquors for sale, or the selling of intoxicating liquors, contrary to the provisions of law, or both the keeping for sale and the selling, do not constitute the maintenance of a nuisance within its terms. They are but evidences of the offense. The keeping of the place where the prohibited act or acts are done by the defendant is what the statute inhibits in this form of action, and the place can be adjudged a nuisance in an equitable action only when the owner or keeper of it is a party defendant, so that he can defend himself and property against the charge, and be condemned, only after a hearing or opportunity to be heard. *State v. Dellaire*, 4 N. D. 314, 60 N. W. 988; *State v. Rozum*, 8 N. D. 558, 80 N. W. 477; *State v. Thoenke*, 11 N. D. 386, 92 N. W. 480. The evidence in this case shows that defendants were not, either jointly or separately, the owners or keepers of the place where intoxicating liquor was kept for sale or sold in violation of law, within the meaning of the statute as above interpreted. "The place," as used in this context, means the particular place, room or apartment wherein the liquor was kept for sale or sold in violation of law. If it were a fact that one or more rooms were used for this unlawful traffic, the place to be abated would be these particular rooms, and not the entire hotel, when the balance of the building was used for lawful purposes, and not for the maintenance of a liquor nuisance. The owner or keeper of the place has reference to the person or persons occupying and using the place for the keeping for sale of intoxicating liquors in violation of law, whether the sales are made personally or through another, and whether the keeper is owner, lessee, or mere licensee of the place. To be the keeper of a nuisance so as to subject the place to condemnation as such, the person must be an occupant un-

der some claim of right, and not a mere transient and naked trespasser therein; and if possession is obtained for a lawful purpose, then, without the knowledge or consent of the owner of the premises, they are used for illegal purposes, the place will not be adjudged a nuisance as against the owner, unless, after knowledge or notice of its unlawful use, he permits the occupancy and use to continue. *Drake v. Kingsbaker* (Iowa) 34 N. W. 199; *Merryfield v. Swift*, 103 Iowa, 167, 72 N. W. 444; *Morgan v. Koestner*, 83 Iowa, 134, 49 N. W. 80; *State v. Lawler*, 85 Iowa, 564, 52 N. W. 490; *State v. Seeverson* (Iowa) 54 N. W. 347; *State v. Price*, 92 Iowa, 181, 60 N. W. 514.

Ed Garrity was a boarder at the Exchange Hotel. His bedroom was upstairs in this building. The upstairs part of the hotel was used entirely as bedrooms for guests of the hotel, and the one used and occupied by Garrity is not described or identified either in the pleadings or by the evidence. He had in his bedroom at one time a case of whisky and four bottles of beer. On three or four occasions, when men were met in another bedroom of the hotel carrying on a poker game, Garrity brought them liquor and sold them drinks. But this was in the bedroom of another guest of the hotel, and this room is not identified. Where Garrity got the liquor he thus sold, whether from his own bedroom or some place out of the building, does not appear. There is no evidence that he at any time sold or gave away the liquor in the room occupied by him as a bedroom, or that the liquor which he had in this room was kept for sale, or for other than his individual use. Garrity was in no way connected with the management of the hotel, as owner, lessee, keeper, employe or otherwise. He had no interest in or authority over such hotel, or any part thereof, excepting the room he occupied as a bedroom. As against him the evidence is entirely insufficient to sustain a finding that he was the owner or keeper of a nuisance within the meaning of this statute.

Again, the place where the liquor was kept, and where the sales were made, being wholly unidentified, a judgment of abatement authorizing it to be closed cannot be entered against it. There is no evidence in the record by which the room occupied by Garrity, where the liquor was kept, can be located and singled out from the balance of the rooms in the second story of such hotel. For the abatement of a nuisance, the place must be particularly identified. *State v. Thoemke*, 11 N. D. 388, 92 N. W. 480.

The deputy sheriff who arrested Garrity testified that he found beer in Garrity's trunk in his room at the hotel when he arrested him on January 20, 1903, and that Garrity, when informed against, pleaded guilty to the charge of unlawfully selling liquor in this hotel; and it is urged by counsel for the state that this is conclusive evidence that Garrity is guilty of maintaining a nuisance in this hotel. The evidence does not disclose that this intoxicating liquor was found and seized on authority of a search warrant. It is true, as contended, that section 7605, Rev. Codes 1899, declares the finding of intoxicating liquor upon the premises to be prima facie evidence of the nuisance complained of, but this court held in *State v. McGruer*, 9 N. D. 572, 84 N. W. 363, that this language has reference to intoxicating liquors found by an officer empowered to search for the same under a warrant, which, in this class of cases, may be issued in connection with a temporary injunctional order. *State v. McMaster*, 13 N. D. 58, 99 N. W. 58. In the case at bar there is no showing that such warrant issued. The liquors were not offered in evidence, and parol proof of what the officer saw in Garrity's trunk is not prima facie evidence of a nuisance under this statute, and, in the absence of statute, the finding of liquor could have no such force as evidence.

Reliance is placed upon the clause in section 7614, Rev. Codes 1899, to the effect that, "upon trial of every indictment, information or contempt proceedings for a violation of the provisions of this chapter, proof of the finding of intoxicating liquor in the possession of the accused, in any place except his private dwelling house or its dependencies, * * * shall be received and acted upon by the court or judge as presumptive evidence that such liquor was kept for sale contrary to the provisions hereof." This statute has no application, for the reason that this was not the trial of an indictment, information, or contempt proceeding. That Garrity was convicted of selling intoxicating liquor in violation of the prohibition statute, upon an information charging sales at the same place, to the same persons that were proven in the case at bar, does not make a prima facie case for the state under the charges in this complaint. As against Garrity, it was competent evidence of the fact that unlawful sales had been made by him, as a link in the chain of evidence to establish the keeping and maintaining of a nuisance. If proof of one offense was sufficient prima facie evidence of another, without proof of any other facts or circumstances, then the first conviction would bar a

conviction of the other offense. But the conviction of an unlawful sale is not a bar to a conviction for maintaining a nuisance, though the unlawful sale upon which the first conviction was based may be evidence, as may the judgment of conviction, in proving the maintenance of the nuisance. *State v. Harris*, 64 Iowa, 287, 20 N. W. 439; *State v. Wheeler*, 62 Vt. 439, 20 Atl. 601; *State v. Lincoln*, 50 Vt. 644. So far as the defendant Garrity has been guilty of violating this statute, his conviction and imprisonment effectually put a stop to his selling liquor in this hotel or elsewhere, and, at the time of the trial below, the proof of his conviction and imprisonment also proved that he then kept no liquor nuisance to be abated.

There was no evidence in the case to justify a judgment against Nelson or Wander. Nelson owned the Exchange Hotel; Wander was a sublessee and one of the proprietors of the hotel business which was conducted in this building. The hotel was operated as a place affording board and lodging to persons seeking its accommodations. The upstairs of the building was used for bedrooms for the guests of the hotel. There is no evidence that either of these defendants kept or knowingly permitted intoxicating liquors to be kept, used, or sold in this building, either by employes, guests, or by any other person. The evidence falls far short of establishing that either of them was the owner or keeper of a place in this hotel where intoxicating liquors were sold, bartered, or given away, or where intoxicating liquors were kept for sale, barter, or delivery or where people were permitted to resort for the purpose of drinking intoxicating liquors as a beverage. The proofs fall short of establishing that either of these defendants had any knowledge or information that Garrity had liquor in his room, or that he made sales of liquor to persons in the hotel. The preponderance of evidence negatives such knowledge. The evidence of Garrity's conviction upon a plea of guilty to a charge of unlawfully selling liquor therein was, as against them, evidence of the fact that Garrity had made such sales in the building, but it was not evidence sufficient to show that the sales were made with their knowledge or consent. Such evidence could amount to no more, as proof of the keeping of a liquor nuisance by Nelson and Wander, than would evidence of the conviction of a burglar for the robbery of a bank be proof of the complicity of the bank's president in the theft. Griffe, the only witness for the state, testified that one night in January, 1903, Nelson and five others were playing poker in an upstairs bedroom in the hotel; that

one of the players sent for some beer, which was brought to and handed into the room by Garrity; and that the money was passed out to Garrity. Garrity did not enter the room, and the witness' evidence that Nelson saw him is mere conclusion. He also testified that Garrity, on one occasion, in the presence of defendant Wander, sold some brandy to Oscar Quamme. The defendants denied all knowledge of these or any sales being made by Garrity in this hotel. Oscar Quamme was a witness, and testified that Griffe's statement was false; that he never bought liquor from Garrity; that he did not know Garrity was selling liquor until the night of his arrest. Griffe was contradicted on material points by two other witnesses in the case. He was a gambler, by his own confession, and was hired to secure evidence against the defendants under a contract by which he was to have no pay unless a conviction was secured, and his pay was out of proportion to the value of his services in case of conviction. Evidence so secured, and from witnesses of this character, is not the safest dependence in ferreting out facts. The defendant Nelson was positive in his assertion that, if liquor was sold in the hotel by any person, it was without his knowledge, permission, or consent. He testified that he did not live in the hotel, but on the evening of the arrest in this case he passed a woodshed next to the hotel, and saw Garrity in there, making a noise, working at something. He went to the door and asked Garrity what he had in there, and received no answer. He walked in to see, and found a barrel of beer; ordered Garrity to get it out of there in a hurry; went at once to Gilkeson and Wander, proprietors of the hotel, told them what he had seen, and ordered the beer taken away and kept away. His instructions to the lessees were that if liquor was used on the premises he would take the place off their hands; that it would not be permitted on the premises. Nelson is amply corroborated upon these points. The evidence is entirely insufficient to sustain a judgment against Nelson and Wander for keeping a nuisance. The trial judge, who had the witnesses before him and was able to judge of their credibility from the vantage ground of personal observation, found in favor of the defendants. Where there is any conflict, the preponderance of the evidence is in favor of the finding of the trial court.

The judgment appealed from is affirmed. All concur.
(99 N. W. 1077.)

NOTE—See reporter's note by Judge Cochrane. *State v. Kerr*, 3 N. D. 531, 58 N. W. 27; also note on other decisions under prohibition law. *State v. Markuson*, 7 N. D. 155, 73 N. W. 82. To recover moneys paid for intoxicating liquors, under section 7621, a demand for the money must precede the suit. *Oswald v. Moran*, 8 N. D. 111, 77 N. W. 281. Burden is on defendant to prove beer not intoxicating. *State v. Currie*, 8 N. D. 545, 80 N. W. 548. The necessity of describing place where intoxicants are sold, applies only to indictment for keeping and maintaining nuisance, and to cases of search and seizure. *State v. Rozum*, 8 N. D. 548, 80 N. W. 477. Where state's attorney makes information upon information and belief before magistrate, deposition upon which same is based must be filed. Sufficient if both filed at same time. *State v. Rozum*, supra. Where a husband allows liquors sold in his home, contrary to law, although done by his wife, who owns the home, he is guilty of keeping and maintaining a common nuisance. *State v. Rozum*, supra; *State v. Ekanger*, 8 N. D. 559, 80 N. W. 482. Where a druggist holds a permit to sell intoxicating liquors, if he establishes a liquor nuisance in his drug store, he may be convicted. *State v. McGruer*, 9 N. D. 566, 84 N. W. 363. Sale of intoxicants by a druggist holding a permit at any other point than that specified therein, is subject to conviction under the prohibition law. *State v. Hilliard*, 10 N. D. 436, 87 N. W. 440. Sale by a druggist holding a permit, outside of its terms, is criminal. *State v. Donovan*, 10 N. D. 203, 86 N. W. 709. Sale by a druggist, holding a liquor permit, to a habitual drunkard is criminal, whether he knows of the habit or not. *State v. Donovan*, 10 N. D. 203, 86 N. W. 709. Proceedings in contempt under the prohibition law are governed by section 7605, not 5942, Rev. Codes, 1899. *State v. Massey*, 10 N. D. 155, 86 N. W. 225. Final order in contempt proceedings under prohibition law is appealable. *State v. Massey*, supra. Sale of liquor in violation of an injunction is a criminal contempt. *State v. Massey*, supra. Citizen of a county where a liquor nuisance exists may bring a suit to abate it without authority or consent of state's attorney or attorney general. *State v. Bradley*, 10 N. D. 157, 86 N. W. 354. Evidence held sufficient to convict. *State v. Thoenke*, 11 N. D. 386, 92 N. W. 480. In actions for abatement of liquor nuisance, an affidavit upon information and belief, not corroborated, insufficient basis for issuing a search warrant. *State v. McGahey*, 12 N. D. 535, 97 N. W. 865 and *State v. Patterson*, 13 N. D. 70, 99 N. W. 67. An action to declare premises a liquor nuisance abates by death of defendant. *State v. McMaster*, 13 N. D. 58, 99 N. W. 58. The action is not *in rem*, and liquors can only be destroyed in an action against the owner found guilty. *Id.* Intoxicating liquors recognized as property. *Id.* Injunction may issue upon affidavit of state's attorney upon "information and belief." *State v. Patterson*, 13 N. D. 70, 99 N. W. 67.

WILLIAM BARRY v. JOHN E. TRAUX, CLERK OF THE DISTRICT COURT
IN AND FOR THE COUNTY OF CAVALIER, IN THE STATE OF NORTH
DAKOTA.

Opinion filed May 21, 1904.

"The Right of Trial by Jury" Embraces All the Elements Known at the Adoption of the Constitution.

1. "The right of trial by jury," which is secured to all by section 7 of the state constitution, includes all of the substantial elements of the trial by jury as they were known to and understood by the framers of the constitution and the people who adopted it.

"The Right of Trial by Jury" as Fixed in the Constitution Is Subject to the Change of Place of Trial at the Instance of the State.

2. The system of trial by jury in criminal cases, which existed in this jurisdiction for 14 years prior to the adoption of the constitution, gave the state, as well as the defendant, a right to have the place of trial changed from the county where the offense was committed to another county, when necessary to secure a fair and impartial trial, and it was the right thus known and understood which is secured by the constitution.

The Common Law Right of Trial by Jury Was Subject to Such Change at the Instance of Either the Prosecution or Defense.

3. At common law the right of trial by a jury of the county of the offense was a general one, not unconditional, but always subject to the exception that the indictment might be removed and the trial take place in another county, either upon the application of the prosecution or the defendant, when necessary to secure a fair and impartial trial.

Statute Authorizing Change of Place of Trial in Criminal Cases Is Constitutional.

4. Section 8122, Rev. Codes 1899, which provides for a change of place of trial to another county, upon the application of the state's attorney, when a fair and impartial trial cannot be had in the original county, merely perpetuates the right as it was known when the constitution was adopted, and also as it existed at common law, and does not violate the right of trial by jury as secured by section 7 of the state constitution.

Certiorari by William Barry against John E. Traux, clerk of the District Court for the county of Cavalier, to review an order granting a change of venue in a prosecution of plaintiff for murder. Writ denied.

Joseph Cleary and Morrill & Engerud, for plaintiff.

The right of trial by jury as guaranteed by the constitution is that recognized by the usage of the common law. Debates Constitutional Convention N. D., pp. 361, 362. *State v. Bates*, 43 L. R. A. 33 and notes; *Harris v. People*, 128 Ill. 585, 21 N. E. 563; *Lommen v. Minneapolis & C. Co.*, 65 Minn. 196; *Sovereign v. State*, 4 Ohio St. 489; *Clark v. Utica*, 18 Barb. 451, 29 Am. Dec. 671; *Watt v. People*, 1 L. R. A. 403.

The elements of the common law right to a jury trial were, twelve lawful men, a unanimous verdict, a panel composed of men from the county where the offense was committed, and the right of challenge.

The term country side meant *the neighbors*, and eventually the county. 2 Pollock & Mairland's History of English Law, 621; 1 Chitty Crim. Law, 177; 3 Reeve's Eng. Law, 476.

The jury must be summoned from the vicinage where the crime is supposed to have been committed. Cooley on Constitutional Law (5th Ed.) 390; Bacon's Abr. "Juries," 308.

"Jury trial," "trial by jury of the vicinage," "trial by jury of the county or district" are synonymous terms. *Watt v. People*, 1 L. R. A. 403; *Swart v. Kimball*, 5 N. W. 635; *Steamboat Co. v. Foster*, 48 Am. Dec. 258; 12 Pl. & Pr., 289 and notes.

Where there is a constitutional guaranty of jury trial, the legislature cannot take away any of its attributes. 4 Enc. of Pl. & Pr. 378 and notes. Among these is a trial by a jury of the county; and the legislature cannot authorize a change of venue by the state. *People v. Powell*, 11 L. R. A. 75; *State v. Knapp*, 19 Pac. 728; *Wheeler v. State*, 24 Wis. 52; *State v. Denton*, 6 Cold (Tenn.) 539; *Dongun v. State*, 30 Ark. 41; *Bramlett v. State*, 31 Ala. 376; *Ex parte v. River*, 40 Ala. 712; *State v. Arrison*, Ohio, 20 Cin. Law Bulletin; *State v. Albre*, 61 N. H. 423, 60 Am. Rep. 325.

It make no difference that some constitutions contain the words "county or district;" they merely express in words what the term criminal jury trial *implies*. See *Watt v. People*, 1 L. R. A. 403; *Swart v. Kimball*, 5 N. W. 635.

"Vicinage," at the common law meant "the county." 1 Stubb's Constitutional History, 664; 1 Taylor's Origin & Growth of English Constitution, pp. 314-333.

Where a crime is committed near the county line, it is often provided that trial may be had in either county on the principle that it

does not deprive the defendant in a material degree of the benefits of a trial in the vicinage. *State v. McCarty*, 39 N. E. 1041; *State v. Lowe*, 45 Am. Rep. 570. While this has in some cases been held unconstitutional, we do not think a case can be found where the state is allowed a change of venue to a distant county.

Geo. M. Price and E. R. Sinkler, for defendant.

The constitutional provision involved is "the right of trial by jury shall be secured to all and remain inviolate, but a jury in civil cases in courts not of record may consist of less than twelve men, as may be prescribed by law." Sec. 7, Const. N. D. We first call attention to decisions of various states upon similar constitutions, and those more restrictive than the constitution of North Dakota.

In Minnesota the constitution contains the provision with the words "within the county or district wherein the crime shall have been committed," added to the usual provision. Notwithstanding this, that state has three times held that the right to try a defendant outside of the county where the crime was committed was constitutional. *State v. Cut*, 13 Minn. 341; *State v. Robinson*, 13 Minn. 453; *State v. Miller*, 15 Minn. 344.

The Iowa constitution has the usual clause without express restriction as to county or district. There a statute, providing that where a public offense is committed on the boundary of two or more counties or within five hundred yards thereof, the jurisdiction shall be in either county, was constitutional.

In Michigan, the constitution provides for trial by jury, and guarantees the right of such trial shall be inviolate, yet a statute providing for a change from one county to another at the instance of either party is unconstitutional. *People v. Pittman*, 52 N. W. 1039; *People v. Furman*, 61 N. W. 865; *People v. Grossman*, 61 N. W. 867.

Ohio upholds the right to change of venue on application of the state. *State v. Meyers*, 21 Weekly Law Bulletin, 57. Change of place of time with the state as moving party is upheld in New York. *People v. Webb*, 1 Hill, 179; *People v. Vermilyea*, 7 Cowan, 132; *People v. Baker*, 3 Parker Crim. Reports, 181; *People v. Wright*, 5 Howards Pr. 526.

In Texas the same is held. *Cox v. State*, 8 Texas Court of Appeals, 254; *Ex parte Cox*, 12 Texas Court of Appeals, 655; *Friz-*

zell v. State, 16 S. W. 751; Robinson v. State, 63 N. W. 869; Benhannon v. State, 14 Texas Appeals, 271; Cannon v. State, 56 S. W. 351.

The Wisconsin constitution contains the provision for a trial "by an impartial jury of the county or district," and under this statute it has been held in that state, that a change cannot be had upon the application of the prosecution. *Wheeler v. State*, 24 Wis. 52. But this case was practically overruled in *State ex rel Brown v. Stewart*, 19 N. W. 429, which held that a statute providing that a crime committed within 100 yards of the dividing line between two counties may be prosecuted in either county, was constitutional.

The constitution of Kentucky provides for "a speedy public trial by an impartial jury of the vicinage." A change of place of trial at the request of the state was upheld in *Commonwealth v. Davidson*, 15 S. W. 53.

Florida has a constitution and statute practically the same as North Dakota's. A change of venue at the request of the state was upheld in *Hewitt v. State*, 30 So. 795.

The construction to be put upon a constitutional provision is to be determined from the laws existing prior to its adoption, and the history of such laws. *People v. Harding*, 51 Am. Rep. 95; 6 Am. & Eng. Enc. of Law, 930; *Opinion of Justices*, 41 N. H. 550.

When the people adopted section 7 of the constitution, declaring the right of trial by jury shall remain inviolate, they referred to jury trials as they were accustomed to it in territorial days and the words of the constitution mean that the right of trial by jury shall remain unimpaired as it was prior to the adoption of that instrument. The courts will construe constitutional provisions to conform to the people's idea or understanding of it. *State v. Pugsley* 38 N. W. 498.

If it is contended that North Dakota adopted her code and constitution from California, and consequently with the construction there given them, it is sufficient to say, that the case of *People v. Powell*, 11 L. R. A. 75, wherein the construction of the provision was given, was not decided until 1891, two years after the adoption of our constitution. This case alone upholds the point striven for by plaintiff, and it is decided upon a false assumption of what the common law was. The common law does not admit of a change of place

of trial at the request of the state. Bishop New Crim. Prac., section 75.

In England the applicant for a change of venue may be either the prosecutor or the defendant. *Rex v. Penperass*, 4 B. & Ad. 574; *Rex v. Hunt*, 3 B. & Ad. 444; *Rex v. Holden*, 5 B. & Ad. 347; *Rex v. Harris*, 3 Burr, 1330; *Rex v. Nottingham*, 4 East, 208.

YOUNG, C. J. The plaintiff, a resident of Cavalier county, in the Seventh judicial district, is charged with the murder of one Andrew Mallem, which is alleged to have been committed in that county on January 3, 1901. He was brought to trial in July, 1901, upon an information filed by the state's attorney of that county. The jury returned a verdict of guilty, and affixed life imprisonment as a penalty. Upon appeal to this court the verdict was set aside and a new trial ordered. *State v. Barry*, 11 N. D. 428, 92 N. W. 809. At the second trial, which took place in November, 1903, the jury failed to agree upon a verdict. Preliminary to the third trial, the state moved for a change of place of trial to another county, upon the ground that a fair and impartial jury could not be secured, or a fair and impartial trial had, in Cavalier county. The motion was granted, against the plaintiff's objection, and on March 7, 1904, the presiding judge made an order transferring the case to Walsh county, which is an adjoining county in the same judicial district. The validity of this order is presented to this court for determination upon a writ of certiorari sued out by the accused, the plaintiff in the present proceeding.

The position of counsel for plaintiff is that the district court was without lawful authority to make the order in question, and that it is therefore void. The order was made under the authority of section 8122, Rev. Codes 1899, which authorizes a change of place of trial in criminal cases upon the application of the state's attorney, and it is not claimed that the application by the state's attorney did not fully comply with the requirements of the statute. The sole contention is that section 8122, *supra*, is unconstitutional. Counsel for plaintiff contend that section 7 of the state constitution, which is a part of the Declaration of Rights, guarantees to every person in this state an unqualified right to a trial by a jury of the county where the offense was committed, and that neither the legislature nor the courts have power to deprive him of that right. Section 7

of the constitution reads as follows: "The right of trial by jury shall be secured to all, and remain inviolate; but a jury in civil cases, in courts not of record, may consist of less than twelve men, as may be prescribed by law." The statutory provisions relating to change of venue in criminal cases are contained in article 5 of chapter 9 of the code of criminal procedure, embracing sections 8110 to 8122, inclusive, of the Revised Codes of 1899. The first section grants to a defendant the right to a change of place of trial when a fair and impartial trial cannot be had in the county or judicial district in which the action is pending, and specifies, as one of the grounds for a change, the impossibility of obtaining a jury that has not formed an opinion as to the guilt or innocence of the defendant such as would disqualify them as jurors. The several sections following this relate chiefly to matters of procedure. Section 8122, upon which this order is based, reads as follows: "The state's attorney, on behalf of the state, may also apply in a similar manner for a removal of the action, and the court being satisfied that it will promote the ends of justice, may order such removal upon the same terms and to the same extent as are provided in this article, and the proceedings on such removal shall be in all respects as above provided."

It is entirely clear that the constitutionality of the statute authorizing a change of the place of trial upon the application of the state turns upon the meaning to be ascribed to the phrase "right of trial by jury." What is the scope and extent of this right, which the Declaration of Rights secures to all and declares shall remain inviolate? Is it an unconditional right to a trial by a jury drawn from the county where the offense was committed, and prohibiting a change of place of trial to another county when a fair and impartial trial cannot be had in the county where the venue was originally laid? If it is true, as counsel for plaintiff contend, that "the right of trial by jury" thus guaranteed is an unqualified right to a trial by a jury of the county where the offense was committed, and that no person can, without his consent, be tried in any other county, it is apparent that no act of the legislature can deprive him of that right. Section 8122, Rev. Codes 1899, which confers the right to change the place of trial upon the state, would in that event be unconstitutional and void, and would furnish no legal justification for the order in question. If, on the other hand, the right to a trial by a jury of the county of the offense is conditioned upon the pos-

sibility of a fair and impartial trial in that county, it will be conceded that section 8122, *supra*, is constitutional and valid. The question involved is an important and delicate one; important, because it calls for a judicial declaration as to the scope of the most important of constitutional rights, the right of trial by jury; delicate, because it involves the consideration of an alleged infringement of that right by a co-ordinate branch of the government. Proper deference for legislative authority has given rise to the settled rule that all acts of the legislature will be presumed to be valid and constitutional, and courts will declare them void only when it is clear that they violate the fundamental law. In case of doubt, the presumption of validity will prevail and the law be sustained. When, however, the conflict is clear, the duty is cast upon the court to declare the conflict, and thus sustain the integrity of the constitution.

We are convinced that the legislation in question is constitutional and valid, and this conclusion does not rest upon the mere presumption of validity which attends all legislative acts. On the contrary, we think it is demonstrably clear that the "right of trial by jury" which is secured by the Declaration of Rights is in no respect impaired by the act of the legislature authorizing a change of place of trial to another county, upon the state's application, when a fair and impartial trial cannot be had in the original county. It will be noted that the constitution does not enumerate the details or incidents of the right of trial by jury. This omission, however, gives no authority to the legislature or to the courts to destroy by legislation or by judicial construction any of the substantial elements of the right of jury trial which were intended to be secured. The constitution refers to "the right of trial by jury" as a right well known and commonly understood at the time of its adoption, and it is the right so understood which is secured by it. Our duty in this case is therefore to ascertain whether it was the understanding of the framers of the constitution, and the people who adopted it, that the right of trial by jury included, as one of its substantial elements, an absolute right to a trial by a jury of the county where the offense was committed. If such was their intent it must be given effect, the same as though it had been expressly written into the constitution. We are unable, however, to find any ground whatever to sustain the existence of any such intent. On the contrary, there is, in our opinion, convincing evidence that the right of trial by jury, as that right was known at the time of the adoption of

the constitution, did not include an absolute right to a trial by a jury of the county where the offense was committed, but that the right was conditioned upon the possibility of a fair and impartial trial being had in that county. In other words, the right of trial by jury, as it now exists, with the right on the part of the state to secure a change of venue to another county when necessary for a fair and impartial trial, is the same as existed when the constitution was adopted. The present statutes regulating changes of venue in criminal cases, including section 8122, *supra*, were first enacted by the people of this jurisdiction in 1875, and they have been a part of the statutory law of this jurisdiction continuously since that date. See sections 285-291, Cr. Proc., Laws 1875, pp. 122, 123; also the same numbered sections of the code of criminal procedure, Rev. Codes 1877; also sections 7312 to 7318, inclusive, Comp. Laws 1887. The constitution was adopted in 1889. It will thus be seen that, for a period of fourteen years prior to its adoption, the people who adopted it had lived under a system of criminal laws created by themselves, which authorized the prosecution, as well as the defendant, to secure a change of place of trial to another county when necessary to a fair and impartial trial. The right, as it exists under the statute under consideration, is therefore the same as that which existed when the constitution was adopted, and for fourteen years prior thereto. The supreme court of Iowa held, upon a similar state of facts, that a like provision in the constitution of that state did not prohibit legislation authorizing a change of place of trial by the state. In that case it was contended that the trial jury must come from the county where the offense was committed. In denying this, the court said: "The first constitution in this state was adopted in 1846, and it contained the following provision: 'The right of trial by jury shall remain inviolate, but the general assembly may authorize trial by jury of a less number than twelve men in inferior courts.' This constitution was superseded by the one now in force, which was adopted in 1857, and it contains, in substance, the same provision. A statute precisely the same as section 4160 of the code was in force when the first constitution was adopted, and such a statute has been in force at all times since 1843. This being so, the right of trial by jury is the same now as it was when the first constitution was adopted, and therefore the statute in question is not unconstitutional, for the reason that the constitutional rights of the defendant have not been in any respect impaired." *State v.*

Pugsley, 75 Iowa, 742, 38 N. W. 498. This conclusion necessarily follows from an application of the well-settled rule of construction which requires that "a constitution shall be held to be prepared and adopted in reference to existing statutory laws, upon the provisions of which in detail it must depend to be set in practical operation" (People v. Potter, 47 N. Y. 375; People v. Draper, 15 N. Y. 537; Cass v. Dillon, 2 Ohio St. 607; People v. Mayor, 25 Wend. 22), and the further rule that courts are bound to presume that the people adopting a constitution are familiar with the previous and existing laws upon the subjects to which its provisions relate, and upon which they express their judgment and opinion in its adoption (Mayor v. State, 15 Md. 376, 480, 74 Am. Dec. 572; State v. Mace, 5 Md. 337; Bandel v. Isaac, 13 Md. 202; Manly v. State, 7 Md. 135; Hamilton v. County, 15 Mo. 5; People ex rel. Kennedy v. Gies, 25 Mich. 82; Servis v. Beatty, 32 Miss. 52; Pope v. Phifer, 50 Tenn. 686; People v. Harding, 53 Mich. 48, 18 N. W. 555, 51 Am. Rep. 95; Creve Cœur Lake Ice Co. v. Tamm [Mo.] 39 S. W. 791). The fact that the constitution secures "the right of trial by jury" by simply declaring it, without adding words expressly limiting the locality of a trial jury, is significant, too, of an intent to merely perpetuate the right as it then existed and was known to the people who gave to the constitution their approbation. Further evidence of this intent is also found in the fact that the statutes relating to a change of place of trial, theretofore in force, were perpetuated upon the recommendation of the two code commissions which were composed of men learned in the law and familiar with the previous legislation of the state. One of the members of the first commission, and its secretary, were members of the constitutional convention. As a contemporaneous construction, this is entitled to great weight. Cooley on Const. Lim. (7th Ed.) 102. See, also, Mayor v. State and People v. Mayor, *supra*; also People v. Supervisors, 100 Ill. 495.

Counsel for plaintiff contend that the right to a trial by a jury of the county where the offense was committed was one of the essential elements of the common-law right of trial by jury, and that the right secured by the constitution must be held to be that recognized by the usage of the common law of England. It is undoubtedly true that the common law may be, and is, properly resorted to as an aid in construction, and, in the absence of other evidence of intent, it might be presumed that it was the intent of the framers of

the constitution to perpetuate the right of trial by jury as it existed at common law. But it is a cardinal rule of construction that a constitution must be so construed as to give effect to the intention of the people who adopted it, and, while it will be construed with reference to the doctrines of the common law, its intent never will be overruled by them. Black on Const. Law, sections 38 and 42; Cooley on Const. Lim. (7th Ed.) 94; Flavell's Case, 8 Watts & S. 197. In short, the question is always one of intent, and, where the intent is clear, it, and not the doctrines of the common law, will prevail. A similar contention was advanced in the case of *The Huntress*, Fed. Cas. No. 6,914, 2 Ware, 89, 4 West. Law J. 38, 24 Am. J. 486, involving the meaning of the words "admiralty" and "maritime," as those words are used in the third article of the constitution of the United States, which extends the judicial powers to "all cases of admiralty and maritime jurisdiction." It was held in that case that the words were used in the sense which they had in this country at the time of the adoption of the constitution, and that where technical terms of law or jurisprudence are used in the constitution, which are common to our own law and to the law of England, if there is a difference of signification in the two countries, the meaning which they have in our own country is to be preferred. We fully approve the principle of interpretation laid down in that case in the following language: "The assumption is, and it is made without a tittle of proof, unless general argument is to be taken as proof, that the framers of the constitution, silently, and without the slightest notice, referred, for the sense of these words, not to the meaning which they had in our jurisprudence, but to that which they bore in the jurisprudence and laws of England. If the fact be so, we will venture to affirm that it is a fact unique in the history of the world. It may safely be said that no man and no other body of men engaged in framing an organic law for the government of a great nation ever, silently and without notice of any such intention, referred, for the sense and meaning of any of their words, to the signification which they had in laws and jurisprudence of a foreign nation, especially if these words had a well-known meaning in their own country. We may here be met by an argument that the constitution does, in fact, refer to the common law for the definition of words, by the use of technical terms of that law, as 'habeas corpus,' 'trial by jury,' etc., without proceeding to define them. But these words were just as familiar in our law as in that of England.

And if, by supposition, there had been any difference in the sense in which they were used in the English statutes and common law and that in which they were generally used and understood in this country, can there be a doubt which sense is adopted by the constitution? The common law, and, of course, the sense in which the technical words of that law are used, was never in force in this country any further than as it was adopted by common consent or by the colonial legislatures. Beyond this, it was as much a foreign law as that of France or Holland; and, for the definition of any technical terms of general law or jurisprudence, we may with just as much propriety refer to the laws of any other foreign country as to those of England, except so far as the law of England has been adopted and incorporated into our own laws and jurisprudence. And where the same words have a different import in the two countries, that which prevails in our own is most certainly to be preferred." It is entirely clear, therefore, that the right of trial by jury which is secured by the constitution is the right of trial by jury with which the people who adopted it were familiar, and that was the right which had obtained a fixed meaning in the criminal jurisprudence of the territory, as defined by the statutes which existed prior to and at the time of the adoption of the constitution. That right, as we have seen, gave to the prosecution, as well as the defendant, the right to change the place of trial when necessary to secure a fair and impartial trial. The present law is in no respect different, and is therefore not vulnerable to the constitutional objection urged against it.

In reaching the conclusion just announced, we have assumed the correctness of the contention that at common law the prosecution had no right to change the venue, but that, on the contrary, it was the defendant's unqualified right to demand a jury panel from the county where the offense was committed. We do not think, however, that this contention accords with the fact. We are of opinion that neither the common law as it existed in England at the time of the Revolution, nor as adopted in this country, gave the defendant an absolute right to a trial in the county of the offense. This is, at least, the opinion of a large number of American courts, whose views are entitled to most respectful consideration, and, as we shall hereafter see, it is sustained by English cases and text writers. In New York, from an early day, it was the custom to award a change of place of trial to the prosecution. In *People v. Vermilyea*,

7 Cow. 137 (1827), it was said that: "The course in criminal prosecutions, where a clear case is made out, is to order a suggestion upon the record that a fair and impartial trial cannot be had in the county where the offense is laid. A venire is then awarded to the sheriff of another county, and the cause is tried there, the indictment remaining unaltered as to the venue." In *People v. Webb* (1841), 1 Hill. 179, the venue was changed in a criminal case, upon application of the public prosecutor, upon the ground that a fair and impartial trial could not be had in the county where the indictment was found. The court said: "The revised statutes impliedly authorize us to make such a change for special cause on an indictment coming into this court on certiorari. This is also an authority which we have at common law"—citing 1 Chitty on Crim. Law 201; *King v. Notingham*, 4 East. 208; *People v. Vermilyea*, supra. In *People v. Baker* (1856), 3 Abb. Prac. 42, a murder case, it was urged that the writ of certiorari could not lawfully issue upon the application of the prosecution to remove an indictment to another county. This was denied, and the court stated that, "There can be no doubt that it has always been competent for counsel for the Crown in England, and, since our Revolution, for the counsel for the people of the state (unless abrogated by statute), to remove criminal cases * * * by certiorari," and, after an exhaustive review of the authorities, held that a change may be ordered upon the application of the prosecution as well as the defendant, when made upon the ground that a fair and impartial trial cannot be had in the original county. In *Price v. State* (1849), 8 Gill. 296, which was a murder case removed to another county, upon the application of the attorney general, for the purpose of securing a fair and impartial trial, it was contended that this was a violation of the common-law right of trial by jury guaranteed by the Maryland constitution. This was denied. The court said: "That the court of king's bench has rightfully exercised this power of removal as an acknowledged, if not essential, part of its ordinary common-law jurisdiction, both in respect to criminal and civil cases, does not seem to have been doubted in any cases in which its exercise is reported to us, of which several may be found referred to in 1st Chitty's Criminal Laws, 201. It is there said that 'At common law the court has power of directing the trial to take place in the next adjoining county when justice requires it.' * * * The same considerations must govern, and the same result be obtained, in regard

to the state and the party. There is no canon of interpretation which can be applied to the one which will not with equal force apply to the other." In *Negro Jerry v. Townshend* (1852), 2 Md. 274, it was said that: "All laws for the removal of causes from one vicinage to another were passed for the purpose of promoting the ends of justice by getting rid of the influence of some local prejudice which might be supposed to operate detrimentally to the interests or rights of one or the other of the parties to the suit. This is a common-law right belonging to our courts, and, as such, can be exercised by them in all cases, when not modified or controlled by our constitutional or statutory enactments"—citing *Price v. State*, supra. The cases last cited were approved in *Cooke v. Cooke*, 41 Md. 362. The supreme court of Pennsylvania, in *Commonwealth v. Balph*, 111 Pa. 365, 3 Atl. 220, after pointing out that its jurisdiction was similar to that of the king's bench, and reviewing the English and American authorities upon this question, stated that: "After a case has been so brought into the king's bench, it may be tried at bar, or at nisi prius by a jury from the county from which the record was brought, or, if it is suggested upon the record and proved by an affidavit that an impartial trial cannot be had in such county, the record may be remanded to another county for trial. The latter is an important provision, as it amounts practically to a change of venue, and may take place in cases when no such change is given by statute"—and reached the conclusion that it "possessed the inherent power of issuing writs of certiorari to remove criminal cases, to try such cases at bar in any district in which it might be sitting, or send it for trial to nisi prius, or, upon sufficient cause shown, to send it to a county other than the one in which the indictment was found." See, also, *Commonwealth v. Delamater*, 145 Pa. 210, 22 Atl. 1098, and *Kendrick v. State*, 2 Tenn. (Cooke) 474, and cases cited. The same view is held in Michigan. The constitution of that state provides that: "The right of trial by jury shall remain. * * *" In *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635, a statute which authorized the indictment and trial of trespassers upon state lands, in any county in the Upper Peninsula, was held unconstitutional, for the reason that it violated the right of trial by a jury of the vicinage as known at the common law—a right which was held in that case, as it is, indeed, in all cases, to be one of the substantial and beneficial elements of a jury trial. The case did not involve the question as to whether the right is unquali-

fied, or the right of the state to secure a change when necessary for a fair and impartial trial. Nevertheless, Mr. Justice Cooley, who wrote the opinion, indicated his views on that subject in the following language: "It has been doubted in some states whether it was competent even to permit a change of venue, on the application of the state, to escape local passion, prejudice and interest. *Kirk v. State*, 1 Cold. 344; *Osborn v. State*, 24 Ark. 629; *Wheeler v. State*, 24 Wis. 52. But this may be pressing the principle too far. *State v. Robinson*, 14 Minn. 447 (Gil. 333); *Gut v. Minnesota*, 9 Wall. 35, 19 L. Ed. 573." The significance of the statement, "this may be pressing the principle too far," will be better understood when we consider that the constitution of Tennessee guarantees a trial by "an impartial jury of the county in which the crime shall have been committed;" that of Arkansas and Wisconsin "an impartial jury of the county or district * * *;" and that it was under these express constitutional limitations as to locality that the courts were constrained to hold, in the cases referred to by Judge Cooley, that the right to a trial by a jury of the county or district was an absolute one. In the later case of *People v. Peterson*, 52 N. W. 1039, 93 Mich. 27, where the question was directly involved, that court held a statute authorizing a change of place of trial upon the state's application was constitutional, and, after quoting the above language of Judge Cooley, said: "This statute is but declaratory of the common-law power vested in the circuit court of this state. It is said by Bishop, in his work on Criminal Procedure, that the change of venue is usually ordered on application of the prisoner, first giving notice to the prosecuting officer, and then supporting the application by affidavits; but it may equally be ordered, in the absence of any provision of written law to the contrary, when applied for by the representative of the government. 1 Bish. Crim. Proc., section 113. In support of this doctrine is cited *People v. Webb*, 1 Hill. 179; *People v. Baker*, 3 Parker, Cr. R. 181. In *People v. Webb*, supra, it was held that a change of venue might be awarded by the court on application of the state, on motion of the public prosecutor, if it appear that a fair and impartial trial could not be had in the county where the indictment was found. We think it is well settled that, where there is no constitutional provision fixing the vicinage within which the trial must be had, the rule of the common law must prevail, unless changed by statute, and that under their common-law powers the

circuit courts have the right, upon cause shown, to change the venue upon the application of the people." This case was followed and approved in *People v. Fuhrmann*, 103 Mich. 593, 61 N. W. 865.

Numerous cases might be cited which, under the supposed coercion of constitutional provisions providing for a trial by a jury "of the county," or "of the county and district," or "of the vicinage," hold that the legislature cannot authorize a change by the state, even when necessary to secure a fair and impartial trial. But, even under such constitutional restrictions, the cases are not uniform. The constitution of Minnesota guarantees "a speedy and public trial by an impartial jury of the county or district where the crime shall have been committed." It was held in *State v. Miller*, 15 Minn. 344 (Gil. 277), that a statute authorizing a change by the state from a county in one judicial district to an adjoining county in an adjoining district was not unconstitutional. The court said, "that both constitution and law are but the affirmance of the common-law right of the defendant to an impartial jury of the county where the act was committed, subject to the right of the court to change the place of trial whenever such impartial jury cannot be had there." *Commonwealth v. Davidson*, 91 Ky. 162, 15 S. W. 53, is to the same effect. The correctness of the declarations as to the common-law right in the cases to which we have referred is, we think, fully sustained by the English cases and text-writers. In England the king's bench had general supervisory jurisdiction, in criminal cases, co-extensive with the kingdom, and a change of the place of trial from the county of the offense in criminal cases was effected by aid of a writ of certiorari issued by that court. In 4 Blackstone, 321, the second of the four grounds upon which that writ was frequently issued is stated as follows: (2) "Where it is surmised that a partial or insufficient trial will probably be had in the court below, the indictment is removed in order to have the prisoner or defendant tried at the bar of the court of king's bench, or before the justice of nisi prius * * *." And in the same connection that learned author states that "a certiorari may be granted at the instance of either the prosecutor or the defendant, the former as a matter of right, the latter as a matter of discretion." See, also, 2 Hawkins' Pleas of Crown, c. 27, section 27. Were authority necessary to sustain the foregoing text, it will be found in the following cases: *Rex v. Holden*, 5 B. & Ad. 346, 2 N. & M. 167; *Rex v. Thomas*, 4 M. & S. 442; *Rex v. Russel*, 4 B. & Ad. 576; *Rex v. Ellis*, 6 B.

& C. 145; Reg. v. Palmer, 5 El. & B. 1024; Rex. v. Penprose, 4 B. & Ad. 252; Reg. v. Fay, Ir. R. 6 C. L. 436; Rex v Hunt, 3 B. & Ald. 444, 2 Chit. 130; Rex v. Eaton (1787), 2 T. R. 81, 1 R. R. 436; In re Lord Lustowit's Fishery, 9 Ir. R. C. L. 46; Reg. v. Barrett, Ir. R. 4 C. L. 285, 18 W. R. 671; Reg. v. Phelan, 14 Cox, C. C. 579. It will appear from an examination of these cases that the writ was granted as of course when applied for by the crown or the attorney general, and that no distinction was made between misdemeanors and felonies, except that in case of a felony the showing by a defendant that a fair and impartial trial could not be had must be more conclusive than in case of a mere misdemeanor. So firmly was the crown's right to the writ established at common law, that acts of parliament which took away the right to the writ in general language were held not to apply to the crown because it was not expressly so stated. Rex v. Bodenham, 9 Ad. & El. 504; Rex v. Bodenham, 1 Cowp. 78; Rex v. ———, 2 Chit. 135; Rex v. Davies (1794), 7 T. R. 626, 5 Eng. R. Cas. 543. It is true that most of the reported cases on this subject are where the application was by the defendant. The reason for this is found in the fact that the crown's right was an admitted one, whereas that of the defendant rested upon an exercise of the court's discretion; and the latter was therefore most frequently the subject of judicial inquiry. The crown's right was seldom, if ever, challenged, and no case has been cited or found by us where it was denied. It was exercised upon the application of the prosecution in Reg. v. Barrett, *supra*, where: "On a trial for felony the jury was not able to agree upon a verdict, and the prisoner was discharged. The crown then moved to have a second trial in some other county, on the ground that a fair trial could not be had in the county where the offense was committed. It was held that the court of queen's bench had the same jurisdiction to change the place of trial in felony as in misdemeanor, and that the place of trial should be changed, as the court was of opinion that a fair trial could not be had in the county where the offense was committed." So, also, in Reg. v. Phalen, *supra*: "In an indictment for murder the trial had twice been ready for hearing; once in the local venue where the alleged crime was committed, and once in the venue fixed by the winter assizes act. On both these occasions the trial was postponed on the ground that an impartial trial could not be had, it appearing on affidavit that large numbers of the jurors who would try the case were members of an association

called 'The Land League,' which association had subscribed to the defense of the prisoners, the crime being of an agrarian nature. The venue was now changed from the local one to a district where it appeared probable that a fair and impartial trial could be had, the crown being put under terms to expedite the hearing of the case, and to pay the costs to the accused persons necessarily incurred by the change of venue." So, too, the place of trial was changed upon the crown's application in a case reported in 2 Chitty, 235. In *Reg. v. Palmer*, *supra*, the defendant was tried for murder, convicted and executed in another county than that of the offense. It is true that in that case the indictments—for there were several of them—were removed to king's bench upon a writ issued upon the defendant's application, but the record shows that the motion which fixed the place of trial was made by the attorney general. Lord Campbell, C. J., said: "No doubt, after the indictment has been removed, there may be a trial at bar, though at present I see no ground for that; or there may be a trial in any county of England in which the court may think it right that such a trial should take place." And the other justices separately expressed their assent to this view. Blackstone, cited to sustain the unqualified character of the right of trial by a jury of the vicinage, does not support that view, but rather the reverse. True, in book 4, p. 351, he says: "When, therefore, a prisoner on his arraignment has pleaded not guilty, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors *liberos et legales homines de vicineto*—that is, freeholders, without just exception—and of the vicinity or neighborhood, which is interpreted to be the county where the fact is committed." And, again, he states that a grand jury "cannot regularly inquire of a fact done out of that county for which they are sworn." But these are statements of general, and not absolute, rules. Indeed, in this connection, on page 304, he cites a large number of offenses, including murder, which, under various and early acts of parliament, might be inquired of and tried in any county of the kingdom, and concludes, "But, in general, all offenses must be inquired into, as well as tried, in the county where the fact is committed." Reference has already been made to his enumeration of the impossibility of a fair and impartial trial in the county of the offense as one of the four grounds for the issuance of the writ of *certiorari*, and that the right to the writ, when applied for by the crown, was absolute.

Further, confirmation is found in his eulogy upon the jury system. Volume 3, p. 385. After stating that "the locality of trial required by the common law" was a result of the ancient locality of jurisdiction, namely, in the manor and the hundred, and gradually in the country, which formerly made it necessary that the jurors should be tenants of the lord or members of the hundred where the offense was committed, he said: "The restriction as to the hundredors hath gradually worn away and at length entirely vanished. That of counties still remains for many beneficial purposes. But, as the king's courts have a jurisdiction coextensive with the kingdom, there surely can be no impropriety in sometimes departing from the general rule when the great ends of justice warrant and require an exception." Our conclusion, that at common law the right of trial by a jury of the county of the offense was a general one, not unconditional, but always subject to the exception that the indictment might be removed and the trial take place in another county, either upon the application of the prosecution or the defendant, when necessary to secure a fair and impartial trial, and without substantial difference between felonies and misdemeanors, except as to the degree of proof necessary to procure the change, is also supported by the text of other distinguished English authors whose common-law learning vouches for the accuracy of their statements. See 1 Chitty, *Crim. Law*, 378, 495; 2 Hale's *Pleas of the Crown*, 162, 210; 1 Roscoe, *Crim. Evi.* (8th Ed.), 290, 372, and cases cited.

The supreme court of California held in *People v. Powell*, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75, that a constitutional provision identical in language with our own—and it is upon this case that counsel for plaintiff chiefly rely—prohibited the legislature from authorizing a change of place of trial to another county upon the state's application. We cannot agree to the correctness of this decision. Its fallacy lies in erroneously assuming that at common law the defendant had an unqualified right to a trial by a jury of the county of the offense. The people of California, when they adopted their first constitution, did not enter into statehood from a territorial government, like the people of this state. In the absence of any other certain means of ascertaining the nature of the right of trial by jury intended to be secured by their constitution, the court turned to the common law, and, assuming that the common-law right was an unqualified one, necessarily reached the conclusion that the legislature could not take it away. The error lies in the assumption.

The crowning purpose of the jury system, through its various stages of development, has been to provide a fair and impartial trial. Under the interpretation of the California court, the right secured is not the common-law right of trial by jury. It is more. It secures to the defendant a fair and impartial trial in the county of the offense, if such a trial can be had; and, if not, it grants him immunity from trial and punishment for his offense. The common law, which may be said to be the ripened product of the wisdom and experience of successive generations, is not properly chargeable with the origin of any such doctrine. The Crown, through the king's bench, always had the power to accord a fair and impartial trial. If it could not be had in the county where the offense was committed, it was secured by transferring the indictment for trial to another county. Our constitution was adopted after, and not in the light of, the California case, and is not therefore controlled by it. As we have seen, the right of trial by jury had acquired a fixed meaning among the people who adopted our constitution when they adopted it, and it is the right thus understood which was secured, and it is, in fact, merely the right as it existed at the common law.

It follows from what we have said that the district court did not act without lawful authority in making the order in question. The writ will therefore be quashed. All concur.

COCHRANE, J., did not sit in the above case or take any part in the decision, Judge CHARLES A. POLLOCK, of the Third judicial district, sitting in his place by request.

(99 N. W. 769.)

L. H. BURTON AND MRS. L. H. BURTON v. A. A. WALKER, JUSTICE OF THE PEACE, AND M. L. SHANKS.

Opinion filed May 27, 1904.

Temporary Injunction Issues Under the Statute Only When Complaint Warrants the Relief Claimed.

1. A temporary restraining order may be issued in a civil action when one of the several conditions enumerated in section 5344, Rev. Codes 1899, is shown to exist, but only "when it shall appear by the complaint that the plaintiff is entitled to the relief demanded."

Injunction Against Threatened Conversion Allowed Only When Remedy at Law Inadequate.

2. A complaint which merely alleges a threatened conversion of personal property, without alleging exceptional circumstances to show that the remedy at law would be inadequate, does not present a case for equitable interference; and in such case it is error to issue a temporary restraining order.

Appeal from District Court, Cass county; *Pollock, J.*

Action by L. H. Burton and wife against A. A. Walker, justice of the peace, and M. L. Shanks. From an order granting an injunction, defendants appeal.

Reversed.

J. F. Callahan and Morrill & Engerud, for appellants.

Extraordinary relief by injunction granted only when irreparable injury will be suffered, and there is no adequate remedy at law. 10 Enc. Pl. & Pr. 950-958; 16 Am. & Eng. Enc. of Law, 360; High on Injunctions, 24, 25, 118-120; Pom. Eq. Jur., sections 1347-1358.

It is not claimed that defendant is insolvent. The property was attached, which presumes an adequate attachment bond; and if proceedings were improper, the liability of the sheriff on his official bond is adequate protection to defendant.

It is not claimed that there is anything peculiar in the nature of the property, or that there are peculiar damages to plaintiff which would afford grounds for equitable relief. The complaint and affidavit set forth only a bare threat of conversion.

The objection to the cause of action rests upon the same principles applied in *Oliver v. Wilson*, 8 N. D. 590, 80 N. W. 757.

An injunction is asked in this case to prevent a justice of the peace from committing an error in a proceeding properly before him. Certiorari or prohibition might lie, but an injunction would not. High on Injunctions, sections 45, 46.

Smith Stimmel, for respondents.

The property is of such a peculiar nature that its value could not be definitely ascertained and the conversion thereof would cause plaintiff peculiar and irreparable injury because of the difficulty in ascertaining its value. In such case party aggrieved is not bound to depend upon the solvency of the transgressor.

The threatened damage in the case at bar was not a mere mistake or blundering ignorance of the justice court, but a flagrant disregard of law and the rights of the defendant, under the advice of counsel. The temporary injunction affected no right of the plaintiffs, nor would it even annoy them; every right of defendants as well as those of the plaintiffs were protected by it. It was an interlocutory order to maintain the status quo of parties until the action could be determined upon its merits. The complaint only asked for temporary relief. *Forman v. Healey*, 11 N. D. 563, 93 N. W. 866; *Allison v. Corson*, 88 Fed. 581.

YOUNG, C. J. The defendants have appealed from an order of the district court overruling their motion to set aside a temporary injunction which was issued and served with the summons and complaint in this action. The order in question enjoined the defendants from advertising and selling two trunks and their contents, which are owned by the plaintiffs, and were seized and are now held by the deputy sheriff under a writ of attachment issued from the justice court of the defendant A. A. Walker in an action wherein the defendant Shanks was plaintiff and these plaintiffs were defendants. The action in justice court was brought to recover a balance of \$82, alleged to be due for medical treatment. The summons in the above case was served on Mrs. Burton, but not upon L. H. Burton, her husband. On the return day, August 15, 1903, the deputy sheriff filed his return showing that service could not be made upon L. H. Burton, whereupon the plaintiff requested the justice to issue a second summons under the provisions of section 6643, Rev. Codes. The defendants (plaintiffs in this action), who were present in person and by counsel, moved to dissolve the attachment, and later offered to waive any alleged defect in the service. Their motion was denied, and the plaintiff's motion for a second summons was granted, and the case was continued to September 12, 1903, the return day named in the second summons. Prior to the return day, and on August 26, 1903, the defendants in that action instituted the present action in the district court. The complaint, in addition to alleging the facts already enumerated, alleges that the defendant Shanks filed a request with the justice of the peace asking that the trunks and their contents be sold, and the proceeds applied to the satisfaction of his claim; and that "in the meantime the defendants herein threaten to sell plaintiffs' trunks and wearing apparel, * * *

and that plaintiffs have reason to believe and do believe that, if not restrained, said justice of the peace will order said trunks and their contents sold; and plaintiffs are liable to suffer irreparable injury and damage, and have not a good, sufficient and adequate remedy at law in the premises." The relief prayed for is that defendants be restrained from selling said trunks, or offering them for sale, and for costs.

The order appealed from must be reversed. The complaint does not state facts sufficient to constitute a cause of action for equitable relief. A temporary restraining order may be issued upon the plaintiff's application to protect his interests in the litigation pending the determination of the action, when one of the several conditions enumerated in section 5344, Rev. Codes 1899, exist; but it may issue only "when it shall appear by the complaint that the plaintiff is entitled to the relief demanded." This case is controlled, both as to the sufficiency of the complaint and the right to the temporary restraining order, by *Forman v. Healey*, 11 N. D. 563, 93 N. W. 866. See, also, *McClure v. Hunnewell*, 13 N. D. 84, 99 N. W. 48. In the case first cited we said that: "The provisional remedy by injunction in this state is of statutory origin, and is granted a plaintiff when necessary to protect his rights pending final determination of the case upon the merits; and this only when the complaint contains averments which, if proven, would entitle plaintiff to the relief demanded, and its issuance is made to appear as necessary to protect plaintiff's rights during the litigation;" citing numerous cases. The complaint in this case, as in the case just referred to, contains no averments which would authorize equitable relief. The most that can be said is that the defendants threaten to convert their property. It is elementary that equity will not interfere to prevent a conversion of personal property save under exceptional circumstances, the remedy at law being usually adequate. No circumstances are alleged in the complaint to take the case from the general rule.

The district court is directed to vacate the order appealed from and also the order granting the temporary injunction. All concur. (100 N. W. 257.)

A. T. WARD AND CHARLES MURRAY, COPARTNERS AS WARD & MURRAY v. JAMES McQUEEN.

Opinion filed May 28, 1904.

Directing Verdict — Renewal of Motion at Close of Testimony.

1. The denial of a motion to direct a verdict is not available as error when further testimony is introduced and the motion is not renewed.

Real Estate Agent — Commissions.

2. A real estate broker, with whom land is listed for sale under an ordinary listing contract, is entitled to the commission provided for in his contract, when he presents to the owner a purchaser who is ready, willing and able to purchase upon the terms specified in the listing contract or upon modified terms which are assented to by the owner; and the refusal of the owner to consummate the sale upon the terms to which he has assented will not defeat the agent's right to his commission.

Appeal from District Court, Steele county; *Pollock, J.*

Action by Ward & Murray against James McQueen. Judgment for plaintiffs. Defendant appeals.

Affirmed.

C. S. Shippy and Morrill & Engerud, for appellant.

Without written authority to him, an agent cannot execute a contract of sale of real estate of his principal as agent. *Brandrup v. Britten*, 11 N. D. 376, 92 N. W. 453; *Ballon v. Bergvendsen*, 9 N. D. 285, 83 N. W. 10

Before a broker, employed to sell real estate, can recover his commission, he must show that he has found a purchaser, ready, willing and able to purchase on all the terms and conditions imposed by the owner, and has brought such person to the owner. *Howie v. Bratrud*, 86 N. W. 747; *Scott et al. v. Clark*, 54 N. W. 538; *Ford v. Easley et al.*, 55 N. W. 336.

E. J. McMahon and F. W. Ames, for the respondent.

Defendant's motion for a directed verdict is not before the court. It is not error to refuse to direct a verdict for defendant, when testimony is thereafter offered, and motion is not renewed at the close of the testimony. *First Nat'l Bank of Fargo v. Red River Val. Nat'l Bank of Fargo*, 83 N. W. 221; *Bowman v. Eppinger*, 1 N.

D. 21, 44 N. W. 1000; *Colby v. McDermont*, 6 N. D. 495, 71 N. W. 772; *Tetrault v. O'Connor*, 8 N. D. 15, 76 N. W. 225.

If the question were before the court, the lower court was right in denying defendant's motion for a directed verdict at close of plaintiffs' testimony. Plaintiffs were employed under a listing contract. They found purchasers and closed a bargain with them. The terms of this bargain, although varying from those of the listing contract, were in writing. They were subsequently submitted to the defendant, read to him and by him fully assented to. Where an agent is employed to sell real estate on certain terms, obtains a purchaser who executes a contract with the owner on different terms, the agent is entitled to his commission under the original contract. *Welch v. Young et al.*, 79 N. W. 59; *Gilder v. Davis*, 20 L. R. A. 398; *Hoadley v. Savings Bank of Danbury*, 44 L. R. A. 321, and foot notes on page 350.

The evidence will be construed most favorably to the plaintiff on a motion to direct a verdict for the plaintiff. *Warnken v. Langdon Merc. Co.*, 8 N. D. 243, 77 N. W. 1000.

It will be assumed to be true, and given the benefit of all the legitimate inferences in the plaintiff's favor. *Bohl v. City of Dell Rapids*, 15 S. D. 619, 91 N. W. 315; *Marshal v. Harney Peak Tin Min. Mill. and Mfg. Co.*, 1 N. D. 350, 47 N. W. 290; *Sanford v. Duluth & Dak. El. Co.*, 2 N. D. 6, 48 N. W. 434.

It is not necessary to prove a purchaser responsible. When he enters into a contract he is presumed to be so, until the contrary appears. *Goss v. Brown*, 18 N. W. 290; *Hart v. Hoffman*, 44 How. Pr. 168.

YOUNG, C. J. This action is brought by a firm of real estate brokers to recover the sum of \$1,040, which they claim is due to them as commission for the sale of 1,040 acres of land owned by the defendant, which he had listed with them for sale. The defendant admits that he listed the lands with plaintiffs, but denies that they made or consummated a sale in accordance with the listing contract or otherwise. The listing contract was in writing, and fixed the selling price at \$16 per acre, net, to the defendant, and gave to the plaintiffs the excess of the selling price above that sum as commission, and prescribed the terms upon which the purchase price was to be paid. At the close of the case a verdict was directed for

the plaintiffs for the full amount claimed. This appeal is from the judgment.

The errors specified in the statement of case as ground for reversal are: (1) The court's refusal to direct a verdict for defendant, (2) the direction of the verdict for plaintiffs, and (3) the exclusion of certain testimony. The first assignment, namely, the ruling upon defendant's motion for a directed verdict cannot be reviewed. The record shows that, after the motion was denied, defendant introduced further testimony and did not renew his motion. It has been repeatedly held by this court that: "Error cannot be predicated upon a refusal to direct a verdict at the close of the plaintiffs' case, when testimony is thereafter offered by the defendant. The error, if any exists, is waived unless the motion is renewed at the close of the testimony." *First Nat. Bank of Fargo v. Red River Val. Nat. Bank of Fargo*, 9 N. D. 319, 83 N. W. 221; *Bowman v. Ep-pinger*, 1 N. D. 21, 44 N. W. 1000; *Colby v. McDermont*, 6 N. D. 495, 71 N. W. 772; *Tetrault v. O'Connor*, 8 N. D. 15, 76 N. W. 225.

Did the court err in directing a verdict for plaintiffs? We think not. The evidence shows, without dispute, that plaintiffs negotiated a sale of the land in question to J. Donald, B. F. Egan and S. Voorhies for \$17 per acre, and upon terms of payment which were assented to by the defendant. A written contract of purchase and sale, embodying the terms thus agreed upon, and assented to by the defendant, was executed in the defendant's presence by the plaintiffs and the purchasers, and \$100 was then paid by the purchasers to the plaintiffs, pursuant to the terms of the written contract, and the said purchasers were then, and have ever since been, ready, willing and able to comply with their contract. This shows a full performance by plaintiffs of the duties of their employment under the listing contract, and entitled them to their commission. True, the agency contract did not give the plaintiffs authority to bind the defendant by a written contract, and the contract which they executed with the purchasers could not therefore be specifically enforced against him, for it is well settled that the agency of real estate brokers under contracts like that involved in this case extends only to procuring purchasers who are acceptable to the vendors, or who are prepared to comply with the conditions of sale proposed by the vendors to their brokers, and does not include authority to execute written contracts binding upon the ven-

dors. *Brandrup v. Britten*, 11 N. D. 376, 92 N. W. 453; *Ballou v. Bergsvendsen*, 9 N. D. 285, 83 N. W. 10. The rule is that "a real estate agent or broker, when duly employed as such, is entitled to his commission, when he has procured a party ready, able and willing to purchase upon the owner's terms, although the agent has made no binding contract of sale with the purchasers." *Scott v. Clark*, 3 S. D. 486, 54 N. W. 538; *McLaughlin v. Wheeler* (S. D.) 47 N. W. 816; *Buckingham v. Harris*, 10 Colo. 455, 15 Pac. 817; *Doty v. Miller*, 43 Barb. (N. Y.) 529; *Delaplaine v. Turnley*, 44 Wis. 31; *Moses v. Bierling*, 31 N. Y. 462; *Hart v. Hoffman*, 44 How. Prac. 168. The defendant's refusal to consummate the sale which his agents had negotiated did not affect their right to the agreed commission. *Lockwood v. Rose*, 125 Ind. 588, 25 N. E. 710; *Fisk v. Henarie* (Or.) 9 Pac. 322; *Kelly v. Phelps*, 57 Wis. 425, 15 N. W. 385; *Willes v. Smith* (Wis.) 45 N. W. 666; *Stewart v. Mather*, 32 Wis. 344; *O'Connor v. Semple*, 57 Wis. 243, 15 N. W. 136; *Bird v. Phillips* (Iowa) 87 N. W. 414.

The terms of sale agreed upon and assented to by the defendant were different in some respects from those stated in the listing contract. For this reason it is contended that the plaintiffs are not entitled to the compensation provided for in the agency contract, but that they must show that the defendant expressly agreed to allow the same compensation for the sale upon the modified terms as was fixed by the agency contract, and this was not done. There is no merit in this contention. Where an agent who is employed to effect a sale of another's land upon certain terms obtains a purchaser who is ready, willing and able to purchase it upon different terms, and the modified terms are assented to by the owner, the agent, in the absence of a new agreement, is entitled to the compensation fixed by his original contract. *Huntemer v. Arent* (S. D.) 93 N. W. 653; *Knowles v. Harvey*, 10 Colo. App. 9, 52 Pac. 46; *Magill v. Stoddard* (Wis.) 35 N. W. 346; *Potvin v. Curran*, 13 Neb. 302, 14 N. W. 400; *Welch v. Young* (Iowa) 79 N. W. 59; *Goss v. Stevens* (Minn.) 21 N. W. 549.

Neither did the trial court commit prejudicial error in excluding the testimony of the defendant to the effect that he had frequently demanded of the plaintiffs the \$100 which was paid to them by the purchasers when the contract was executed, and that he had not received any sum from the plaintiffs, or any person, on account of the sale. The defendant did not deny, or offer to deny, that the

contract which his agents made with the purchasers was corrected to conform to his wishes, was read to and understood by him, and was executed in his presence. Under the express terms of this contract the \$100 payment went to the agents. He was entitled to further payments only when he would consummate the sale according to the terms of the contract. This he arbitrarily refused to do. Evidence that he repeatedly demanded money to which he was not entitled under the terms of the sale—and his alleged demands assume that there was a sale—was, from defendant's standpoint, clearly immaterial upon any issue of fact involved in the case.

Finding no error in the record, the judgment will be affirmed. All concur.

(100 N. W. 253.)

REEVES & COMPANY V. JOHN BRUENING.

Opinion filed May 31, 1904.

A Written Order for Purchase of Machinery With Terms and Description Becomes a Contract When Accepted.

1. A written order for machinery to be shipped to the purchaser, which fully describes the machinery and the terms under which it is to be purchased, becomes a contract by the unconditional acceptance of such order.

Such Order May Be Revoked Before Acceptance.

2. Until acceptance such order is not a contract, and may be revoked, but not after acceptance.

Acceptance Is Effected by Mailing a Letter Containing It to the Buyer.

3. The acceptance becomes effective when a letter containing an acceptance of the order is duly deposited in the post office for transmission to the person who gives the order.

Parol Evidence Is Inadmissible to Vary Terms of an Accepted Order.

4. Parol evidence is not admissible to show that the contract is different from that contained in the accepted order.

Written Contract May Be Modified Orally if Modified Agreement Is Executed.

5. Parties to a contract can, by consent, orally modify or waive the terms of a written contract, if such modified contract is executed.

Delivery of Property Under Terms of Contract — Waiver.

6. Where a written executory contract of sale specifies the terms, under which delivery shall be made, delivery is not shown as a matter of law by pointing out the property in a deliverable condition, nothing being said or done to show a waiver of some of the conditions under which delivery was to be made and the title was to pass.

Intention Determines Delivery.

7. The intention of the parties at the time that delivery is claimed determines whether delivery was made or not.

Evidence — Delivery.

8. The evidence in the case considered, and *held* not to show a delivery of the property as a matter of law.

General Agent.

9. A general agent of a machine company, whose authority is not in writing, is a competent witness as to what authority he has.

Appeal from District Court, Foster county; *Glaspell, J.*

Action by Reeves & Co. against John Bruening. Judgment for plaintiff and defendant appeals.

Reversed.

White & Craven and Morrill & Engerud, for appellant.

Plaintiff cannot recover without proof that sale was executed and title passed. Section 4987, Rev. Codes 1899; Benjamin on Sales, section 1117; Mechem on Sales, section 1665.

If the sale is not consummated, and no title passes, plaintiff must seek his redress under sections 4988 and 5009, Rev. Codes 1899. *Tufts v. Grewer*, 22 Atl. 382; *Greenleaf v. Gallagher*, 45 Atl. 829; Mechem on Sales, section 1689.

The evidence only shows a proposal revoked before acceptance. Order was left with Chaffee Bros. & Co. for transmission, Aug. 17, 1903. It could not reach Reeves & Co. before Aug. 18, 1903. The letter of acceptance was not mailed until Aug. 18th or 19th. The letter revoking the order was mailed Aug. 17th. If leaving the order with Chaffee Bros. & Co. was a delivery, such order on its face was a mere proposal to buy, and could not become a contract until accepted. Section 3836, Rev. Codes 1899, Subdiv. 2; section 3841 Rev. Codes 1899; Mechem on Sales, section 217 et seq.; Benjamin

on Sales, section 38; McCormick Harv. Mach. Co. v. Richardson, 56 N. W. 682; Durkee v. Schultz, 98 N. W. 149.

The proposal itself prescribed that acceptance should be by the home office and communicated by it. No other acceptance was binding. Rev. Codes, section 3858; Mechem on Sales, section 239; Benjamin on Sales, 54; Eliason v. Henshaw, 4 Wheat. 224, 17 U. S. 224, 4 Sup. Ct. Rep. 556; Carr v. Duval, 14 Peters, 77, 10 Sup. Ct. Rep. 361; Durkee v. Schultz, 98 N. W. 149.

If the evidence showed an executory contract of sale it did not show an executed one. The essential condition to an executed contract of sale is a transfer of title to the thing sold. Woodbury v. Long, 8 Pick. 543; Council Bluffs Iron Works v. Cuppey, 41 Iowa 104.

Readiness and willingness to deliver does not make a delivery, much less a transfer. Woodbury v. Long, 8 Pick. 543; Council Bluffs Iron Works v. Cuppey, 41 Iowa, 104; Tufts v. Grewer, 22 Atl. 382; Greenleaf v. Gallagher, 45 Atl. 829.

Delivery and transfer are largely matters of intention of parties. Especially is this true where there is no change of possession. Change of title is a fact to be inferred from facts and circumstances. Mechem on Sales, sections 3, 4, 477 et seq. and 546, 547 and notes; Foster v. Ropes, 111 Mass. 10; Benjamin on Sales, section 309 and notes.

H. R. Turner, for respondent.

The written appointment of Weego, the general agent, only provided for his salary and the length of his service and did not specify his duties. It was competent for him to testify as to these. Mechem on Agency, section 102; Perry v. Hedrick, 98 Am. Dec. 774; Gould v. Norfolk Land Co., 57 Am. Dec. 50.

Parol evidence of a prior agreement may be received by the court to place itself in the situation of the parties to a written instrument and to identify the subject matter. 2 Jones on Evidence, section 455. The testimony of a subagent is also competent. Dunham v. Gill, 48 Ill. 151.

Revocation of an order is of no effect until brought to the mind of the person to whom the offer was made, and a revocation by mail does not operate from the time of posting. Beach on Contracts, section 39.

The delivery of goods without insisting on a condition, thereby making it an unconditional delivery, waives any contract antecedently made. *Chapman v. Lathrop*, 16 Am. Dec. 433.

When the condition is waived by the vendor of personal property, the property will vest in the vendee. 6 Am. & Eng. Enc. Law (2d Ed.) 474; *Smith v. Dennis*, 17 Am. Dec. 368; *C. Aultman & Company v. Silha et al.*, 55 N. W. 711.

MORGAN, J. This action is brought to recover the purchase price of a steam threshing outfit, consisting of an engine and separator and all other necessary parts to make the outfit complete. The complaint contains the following allegations, after a particular description of the property, viz.: "That afterwards, on the 17th day of August, 1903, the defendant purchased of the plaintiff, by his unconditional order in writing, the above-described personal property for the sum of \$3,100; that by virtue of the terms of said written order and sale the defendant agreed to pay to the plaintiff the aforesaid \$3,100 by delivering a proper and sufficient mortgage * * * and execute five promissory notes. [Here follows description of notes.] That by virtue of the further terms and conditions of said written order defendant agreed to pay the freight on said property from Columbus, Indiana, to Carrington, North Dakota, which freight was and is the sum of \$262. That on or about the 17th day of August, 1903, said property and machinery was complete and ready for delivery at Carrington, North Dakota, and on said day the plaintiff, through its agents, Chaffee Bros. & Co. of Carrington, North Dakota, sold and delivered to the defendant all of the above foregoing described property. That the plaintiff has demanded the foregoing notes and mortgage for the purchase price of said property and machinery, together with the \$262 freight thereon, all of which the defendant refuses to execute and deliver, and refuses and neglects to pay the freight on said property, or any part thereof, as above stated. That by virtue of the terms and conditions of said written order and sale of said property, and on account of the failure of said defendant to execute and deliver said notes and to pay the freight hereinbefore set forth, the plaintiff had the right to declare the entire purchase price of said property due and payable, and the plaintiff has so elected and declared the said purchase price of said machinery now due." The answer alleges, in effect, that there was no perfected sale of the property in question; that defendant proposed in writing

to buy the threshing outfit, but before the same was accepted by the plaintiff defendant withdrew his proposition of purchase. And defendant further denies generally all the allegations of the complaint. The trial court directed a verdict for the plaintiff for the price of the property specified in the contract and for the freight agreed to be paid, being in all for the sum of \$3,416.75. The defendant appeals from the judgment and specifies errors of law in the admission of testimony and error in directing a verdict.

The errors relied on may be considered under three divisions: (1) Admissibility of certain evidence of conversations between the parties before the written contract was entered into; (2) admissibility of certain evidence as to the authority of the general agent of the plaintiff, who was acting under a written contract; (3) insufficiency of the evidence to justify a direction to the jury that, as a matter of law, the sale was an executed sale, or in directing the jury as a matter of law that there was a delivery of property to the defendant.

The evidence is practically uncontradicted, and is substantially as follows: On August 17, 1903, the defendant, Bruening, stated to the firm of Chaffee Bros. & Co., the plaintiff's local agents at Carington, N. D., at their office in said city, that he was now ready to buy the threshing rig if terms could be agreed on. There had been conversations between the agents and the defendant in regard to such purchase before. They talked over the price and terms of payment on this day, and during such talk Mr. Chaffee talked with Mr. Weego, the company's general agent at Fargo, over the telephone, and stated to him the price and terms proposed by the defendant. Weego stated that the defendant ought to pay certain sums that fall. The defendant said he could not, and Chaffee so repeated his answer to Weego, who then accepted the offer of the defendant and told Chaffee to let him have the rig. Chaffee told the defendant what Weego said, and further told him: "Mr. Weego accepted the offer, and the rig was his, and Mr. Houlihan will draw up the contract in accordance with our talk. * * * You can take the rig at any time." Immediately after this conversation over the telephone an order was drawn up and signed by the defendant, and sent by mail to Fargo, to the general agent, Mr. Weego. This order for the rig provided that it was taken subject to the approval of Reeves & Co., and contained a description of the property, price and terms of payment, and contained a provision that the title

to the property should remain in Reeves & Co. until paid for in full, and that the freight was to be paid and settlement made by paying cash or giving notes at the time defendant received the property under the contract. This order was immediately sent by mail to the company's offices at Fargo, and on August 18th was accepted by letter to the defendant from Mr. Weego, and the letter mailed before 6 o'clock a. m. of August 19th. In this letter the general agent stated that the order was acceptable, and that settlement papers had been prepared and sent to Chaffee Bros. & Co. On August 17th, in the afternoon, the defendant attempted to countermand and revoke the order that he had previously signed that day, and wrote Chaffee Bros. & Co. at Carrington and Reeves & Co. at Fargo that he cancelled the order. He had ever since refused to accept the machine and to settle therefor by giving the notes and security provided for by the contract. Before these letters were written, and right after signing the order, it is claimed by respondent that the machine was delivered to the defendant. It is also claimed by respondent that the terms of the written order were modified, and that it was understood between the parties that the order was given and received in reference solely to the rig then on hand at Carrington. It is also claimed that the terms of the order as to transfer of title, delivery and settlement were all waived, and that unconditional delivery was made without complying with any of the terms of the order as to these matters. The evidence upon the question as to the delivery of the machine is as follows: That Chaffee stated to the defendant at the close of the conversation over the telephone with Weego, "The rig is yours; you can take it at any time," and other similar statements; that afterwards the defendant and the witness Houlihan, an agent of plaintiffs, had the following conversation at or near the machine: "After we had written up the written contract, he wanted to know if the machine was ready to take out, and everything with it. I told him, as far as I knew, everything that came with the machine was there, and we went and walked up to it, and stepped up on the wheel of the water tank and looked over the tools, and I unlocked the tool box, and he looked them over, and he said he wanted to take it home on Saturday, and I told him there was water in the engine, and everything was ready to start up." Under the facts as set forth it is claimed by respondent that: (1) The contract entered into was an executed one, and passed the title to the property by virtue of the acceptance

by Weego of the terms and conditions of the sale over the telephone; (2) there was an actual delivery of the rig to defendant, even if the contract be executory.

The cause of action as set forth in the complaint is upon the written order and the delivery under it. The written order is pleaded, and its terms relied on for judgment for the price of the rig, for the reason that defendant refused to pay the freight and to execute notes and a mortgage as agreed to in the order. The written order and its acceptance form the contract entered into by the parties. Prior or contemporaneous negotiations in reference to the terms of the contract cannot be considered in determining what the contract is, as all such negotiations are deemed to have been incorporated therein, and are superseded by such written contract. Section 3888, Rev. Codes 1899. This provision of the code applies in its full extent in this case, as the facts do not bring it within the rule established by cases that oral declarations may be considered when the written contract is ambiguous, or is silent upon the subject of an additional agreement. *Mott v. Richtmyer*, 57 N. Y. 49; *Brown v. Russell*, 105 Ind. 46, 4 N. E. 428; *Brewster v. Potruff*, 55 Mich. 129, 20 N. W. 823. In this case the written order deals with a rig to be shipped from Columbus, Ind. It provides that the order is taken subject to approval by Reeves & Co. The written contract provided that delivery was not to be made before settlement for the machine. It provided that the title to the property remained in Reeves & Co. until paid for. Plaintiff endeavored to show by Chaffee's evidence that the contract was modified in these particulars by waivers prior to the execution of the order, and by statements and declarations of the parties showing that an immediate delivery was made and contemplated by the parties. The terms of the contract, as made by the written order, followed by the acceptance, cannot be changed by such conversation or declaration. The contract cannot be modified or varied by parol evidence of what happened during the negotiations. The contract thus entered into was executory in every particular. The notes were to be executed, secured by mortgages; freight charges were to be paid in cash; the title remained in the seller; possession was not given to the purchaser until the property was paid for in cash or settlement made by notes; and in no sense or particular was the contract as entered into an executed contract or sale. The defendant could not compel delivery to him unless he had paid the freight and tendered the notes. The accept-

ance of the order did not constitute the transaction a sale as a matter of law. Parsons on Cont. vol. 1 (9th Ed.) p. 529. From the contract it therefore plainly appears that neither the title was to pass nor delivery be made until these conditions as to settlement were complied with. Whether the order be deemed to have been accepted by mail or by authority of Weego to Chaffee over the telephone, it was not revoked before acceptance. There can be no revocation after acceptance, as the contract is entered into by such acceptance. Section 3862, Rev. Codes 1899; *Hawkinson v. Harmon*, 69 Wis. 551, 35 N. W. 28. The plaintiff cannot plead the order and unconditionally rely upon it for a recovery, and at the same time claim a parol modification of it made before its acceptance. After acceptance of the order the contract could be modified by consent if the modified contract was executed. The parties could agree that the defendant would take the machine then on hand in place of the one to be shipped under the terms of the order, and delivery could be agreed upon without executing papers or paying freight, and oral proof given in respect to such modified contract, if followed by delivery. Section 3936, Rev. Codes 1899.

It is contended that Weego had no authority to accept the order, and that it was error to admit his testimony to the effect that express authority had been conferred on him to accept orders for machines. He was general agent for the plaintiff company in this state. His powers or duties as agent were not reduced to writing. He was a competent witness to testify what his authority was. Section 102, Mechem on Agency, and cases cited; *Piercy v. Hedrick*, 98 Am. Dec. 774; vol. 2, Greenl. Evi. (16th Ed.) section 63.

So far as the attempted revocation is concerned, it is immaterial whether the acceptance was by letter or by parol. In either case the acceptance was before a revocation was communicated to the company or to any of its agents. Section 3862, Rev. Codes 1899. In either case such acceptance mutually bound the parties to the contract. Contracts entered into by acceptance of an offer cannot be modified by showing by parol a different contract, any more than any other explicit contract can be so modified. *Hooker v. Hyde*, 61 Wis. 204, 21 N. W. 52; *McCormick Harvester Co. v. Markert*, 107 Iowa, 340, 78 N. W. 33.

It now remains to be determined whether, as a matter of law, there was a transfer of the title and a delivery to the defendant on the day the order was signed. On plaintiff's part it is claimed that

the oral acceptance of the order by Weego, with a direction to Chaffee to let defendant have the machine, followed by telling defendant that he could have the machine at any time, and the machine being in condition for delivery, and defendant stating that he would want it on Saturday, with defendant's inspection of it as stated heretofore, constituted a delivery. On a valid sale of such property, this would probably be a sufficient delivery between the parties. But whether this is so under a written contract for a sale, stipulating under what conditions delivery shall be made, and under what conditions the title shall pass, is a different and more difficult question. To say that there was a change of title and a delivery of possession presupposes that the original order was, by consent, modified, so that the defendant was to accept a rig then on hand in place of one to be shipped from Indiana, and presupposes the further fact that the plaintiff waived all of the conditions of the written contract as to payment of freight and settlement by notes and mortgages. We cannot agree with the trial court that such facts were shown as a matter of law. This involves the question whether it appears from the facts that it was then the intention of the parties that the machine was then and there unconditionally delivered to the purchaser, and whether it was the intention of the seller then and there to waive all conditions precedent to delivery, as stated in the contract. Does the evidence conclusively show that the seller manifested by his words or conduct an intention to waive all security and rely upon the personal responsibility of the purchaser for the payment of the price? We do not think that the evidence in the case warrants such a conclusion. During the negotiations, nothing had been said that freight charges were not to be paid, nor was anything said that title should not remain in the company; nor was anything said at the machine, or before, that plaintiff delivered the machine to defendant or words to that effect. What was there done and said is not inconsistent with the fact that it was simply an examination to ascertain if the machine was in shape for delivery when delivery was to be made. We think the evidence insufficient, as a matter of law, to show that such was then the intention of the parties. This question as to the intention that delivery was then made, and whether plaintiff waived, and then intended to waive, the terms of the order as to settlement notes, payment of freight, and other provisions, is to be determined by what was said and done at the time it is claimed delivery was made, together with other circumstances subsequent

or prior thereto that will throw light on the question as to what was then the intention and understanding of the parties as to delivery and waiver. The intention of the parties at the time that delivery is claimed determines whether delivery was made or not. Mechem on Sales, vol. 1, section 552, and cases cited; *Leavitt v. Rosenthal* (Sup.) 84 N. Y. Supp. 530; *Gibson v. Chicago Packing Co.*, 108 Ill. App. 100; *Paul v. Reed*, 52 N. H. 136; *Witte v. Reilly*, 11 N. D. 203, 91 N. W. 42.

The court directed a verdict for the contract price. Plaintiff has not conclusively brought itself within section 4987, Rev. Codes 1899, providing that the detriment caused by a breach of the buyer's contract to accept and pay for personal property, the title to which has vested in the buyer, shall be deemed to be the contract price. Unless there was an unconditional change or transfer of the title, the contract was not fully executed, and the measure of damages laid down in section 4987, *supra*, does not prevail. In this case there was a refusal to receive the property, and plaintiff would have a remedy under section 4988, Rev. Codes 1899. *Stanford v. McGill*, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760; *Minn. Thresher Mfg. Co. v. McDonald*, 10 N. D. 408, 87 N. W. 993. The complaint sets up a cause of action for the price of property sold and delivered. The facts do not conclusively show a sale or a delivery. The facts show only a contract for a sale. It is claimed by respondent that the transaction became an actual sale at the moment the general agent accepted the order and authorized the local agents to let the defendant have the machine; in other words, that it became an oral sale, followed by delivery. The delivery necessary to satisfy the statute of frauds must be of a different character than in cases of sales not within the statute. To satisfy the statute of frauds, there must be delivery and acceptance of the property. Delivery alone will not suffice. *Dinnie v. Johnson*, 8 N. D. 153, 77 N. W. 612, and cases cited.

The judgment is reversed, a new trial granted, and the cause remanded for further proceedings. All concur.

(100 N. W. 241.)

HANNAH KARSTENSEN HELGEBYE v. CARL O. DAMMEN.

Opinion filed, May 31, 1904.

Land Acquired by Possession and Part Performance of Oral Contract for Purchase Is Subject to Homestead Rights.

1. A homestead may be claimed on land resided upon, when the right to residence upon such land is based on an oral contract for the purchase of such land, followed by occupancy under such contract, and part performance thereof.

Concurrence of Both Spouses Essential to a Valid Conveyance of Homestead.

2. The homestead of a married person cannot be conveyed or incumbered, in this state, unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife.

Homestead Cannot Be Claimed in Land Held on Contract After Default and Abandonment of Contract.

3. A person residing on land, and claiming it as a homestead, under an oral contract for its purchase on specified terms, and failing to fulfill such terms, and having abandoned the contract under which he holds such homestead, cannot claim a homestead in the land after the abandonment of such contract.

After Voluntary Abandonment of Homestead, Wife Cannot Reassert the Right Under a Decree in Divorce Proceedings.

4. A wife voluntarily abandoning such land as a homestead, with her husband, cannot thereafter claim such land as a homestead, although the ownership thereof is awarded to her absolutely by a decree in which she is granted a divorce.

Wife's Homestead Right Covers no More Than Husband's Interest in the Land — Tender of Performance.

5. A wife, claiming a homestead under her husband's contract for the purchase of land, has no greater rights to such land as a homestead than her husband would have under such contract. A husband cannot demand a deed of such land without compliance with the contract, nor can a wife demand a deed of such land until she has tendered performance of the terms of such contract, in cases where the husband has abandoned the contract and the land.

Appeal from District Court, Traill county; *Pollock, J.*

Action by Hannah Karstensen Helgebye against Carl O. Dammen. Judgment for defendant and plaintiff appeals.

Affirmed.

Freerks & Frercks, for appellant.

Partial performance of an oral agreement for the sale and purchase of real estate, satisfies the statute of frauds. Section 3960, Rev. Codes 1899; *Farley v. Vaughn et al.*, 11 Cal. 227; *Deeds v. Stephens*, 69 Pac. 534; *Fidler et al. v. Norton et al.*, 30 N. W. 128; *McCullom v. Mackrell*, 83 N. W. 255; *Lothrop v. Marbel*, 81 N. W. 885; *Myrick v. Bill et al.*, 5 N. D. 167, 37 N. W. 369.

Homestead right will attach to land held under contract. *Roby v. Bismarck National Bank*, 4 N. D. 166, 59 N. W. 719; *Myrick v. Bill et al.*, 5 N. D. 167, 37 N. W. 369; *Hoy v. Anderson*, 58 N. W. 125; *Allen v. Caldwell*, 20 N. W. 692; *Wilder v. Haughey*, 21 Minn. 101; *Rawles v. Reichenbach et al.*, 90 N. W. 943.

Provision for forfeiture of contract for sale of land is waived by subsequent conveyance to vendee or his assignee. *Alexander v. Jackson*, 92 Cal. 514, 27 Am. St. Rep. 158, 28 Pac. 593; *Blue v. Blue*, 38 Ill. 9, 87 Am. Dec. 267; *Allen v. Hawley*, 66 Ill. 164; *Watson v. Saxer*, 102 Ill. 585; *Kitterlin v. Milwaukee Mechanics' Mutual Ins. Co.*, 25 N. E. 768; *Stafford v. Woods*, 33 N. E. 539; *Persiful v. Hind*, 88 Ky. 296; *State v. Diviling*, 66 Mo. 375; *Libbey et al. v. Davis*, 34 Atl. 744; *Chopin v. Runte*, 44 N. W. 258.

The rule is the same whether contract is written or oral. *Fyffe v. Beers*, 18 Iowa, 11, 85 Am. Dec. 577; *Smith v. Chenault*, 48 Tex. 455; *Dotson v. Barnett*, 16 Tex. Civ. App. 258.

The homestead of a married person cannot be conveyed or incumbered, unless husband and wife execute and acknowledge the instrument. Section 2608, Rev. Codes 1899; *Violet v. Rose*, 58 N. W. 216; *Whitlock v. Gosson et al.*, 53 N. W. 980; *France v. Bell et al.*, 71 N. W. 984; *Swift et al. v. Dewey et al.*, 29 N. W. 254.

The ownership may be in fee simple, or equitable under a contract of purchase. *Giles v. Miller*, 54 N. W. 551.

Statute must be literally complied with, both as to consent and mode of manifesting it. *Cumps v. Kiyo*, 80 N. W. 937; *Haggerty et ux v. Brower*, 75 N. W. 321; *Goodwin v. Goodwin*, 85 N. W. 31; *Anderson v. Culbert*, 7 N. W. 508.

Not rendered effective by subsequent termination of the homestead privilege. *Gagliardo v. Dumont*, 54 Cal. 496; *Powell v. Patison*, 34 Pac. 677.

The sale by plaintiff's husband, and assignment of the contract to defendant were void, and the deed in fulfillment of the contract was

in equity a deed to plaintiff's husband. *Moore v. Reaves*, 15 Kan. 121-123.

The statutory requirements for alienation of the homestead cannot be waived. *Law v. Butler*, 9 L. R. A. 856; *Minnesota Stoneware Co. v. McCrossen*, 85 N. W. 1019; *Howell v. McCrie*, 59 Am. Dec. 584; *Ott v. Sprague*, 27 Kan. 620; *Gagliardo v. Dumont*, 54 Cal. 496; *Gardner v. Gardner*, 82 N. W. 522.

Plaintiff could not be divested of her rights without a foreclosure or legal cancellation of the contract. *Buchholz v. Leadbetter*, 92 N. W. 830.

Defendant may recover any damages sustained from plaintiff's husband, as money obtained under false pretenses. *DeKalb v. Hingston*, 73 N. W. 350; *Morris v. Wells*, 66 S. W. 248; *Thimes v. Stumpff*, 5 Pac. 431; *H. Stern, Jr., & Bros. Co. v. Wing et al.*, 97 N. W. 791.

P. G. Swenson, for respondent.

To enforce an oral contract for the purchase of land upon the ground of possession and part performance, it is essential that such oral contract be definite and the terms of payment certain. *Eckel v. Bostwick et al.*, 60 N. W. 784.

If husband had no title in the land, the wife had no homestead interest therein. And if the interest of the husband was terminated the wife's homestead interest terminated with it. The claim is based on an oral contract and part performance. If the contract was valid, its validity depended upon Mr. Helgebye being in possession, for if possession is abandoned, all claim to part performance is lost. 26 Am. & Eng. Enc. Law (2nd Ed.) 58.

If the husband's ownership in the land ceased by abandonment, the wife's homestead right ceased also. *Kuhnert v. Conrad*, 6 N. D. 215, 69 N. W. 185; *Snodgrass et al. v. Parks et al.*, 21 Pac. 429; *Dahl v. Thompson*, 67 N. W. 579; 15 Am. & Eng. Enc. Law, 563.

A written contract for the sale of land may be annulled by parol. *Wadge v. Kittleson*, 12 N. D. 452, 97 N. W. 856; *Mahon v. Leech*, 11 N. D. 181, 90 N. W. 807.

Under the deed from Erickson to defendant, the latter would be subrogated to all the rights of Erickson to receive the purchase money on the contract if in force. *Hunter v. Coe and McDevitt*, 12 N. D. 505, 97 N. W. 869.

MORGAN, J. In October, 1898, one Erickson was the owner of the 160 acres of land involved in this suit. During that month he entered into an oral contract with one Helgebye, then plaintiff's husband, by virtue of which contract said Erickson agreed to convey the land to Helgebye upon payment of \$3,100, to be paid by turning over to Erickson one-half of the crops raised thereon each year. On deferred payments 6 per cent interest was also payable. Helgebye moved a house upon the land, valued at \$100. Thereafter he, together with his wife and children, moved upon said land and made it their home until March, 1902. In October, 1899, Helgebye paid \$93 in cash upon the contract. No other payment was ever made on the contract. Crops were raised on the land by Helgebye in 1899, 1900 and 1901, but no part of them was turned over to Erickson. During the year 1901 Helgebye was desirous of relieving himself from his contract, for the reason, as stated by him, that he was owing too much, and was unable to carry on the contract any longer. He and Erickson talked matters over, and Erickson was willing that he should sell his interest in the land, providing he got his pay for it. Helgebye and the defendant, Dammen, agreed upon terms, under which Dammen was to take the land at \$3,500—a better price than Helgebye had agreed to pay for it. Helgebye also arranged with Erickson that he would take \$2,800 for the land, in view of the fact that this \$2,800 was to be cash or its equivalent. On October 7, 1901, Erickson conveyed the land by deed to Dammen, and, in pursuance of Helgebye's agreement with these parties, Erickson received his \$2,800, partly in cash and the balance of \$1,800 secured by mortgage. Helgebye received \$700 in cash, and a receipt for \$300 owed by him to Dammen. Mrs. Helgebye was at this time living on the land with her husband and children. She did not execute any papers, nor was she consulted as to the arrangement, so far as the evidence shows. It inferentially appears from the evidence that she had knowledge of the transactions between her husband and these parties at the time, but on that question the evidence is not satisfactory, and is not made the subject of a finding by the trial court. The wife did not personally receive any of the \$700, although some of it was used for the support of the family. Soon after the sale to Dammen, Helgebye went away, and remained away till winter, and returned in March, 1902; and soon thereafter the family left this land, and went to live on a rented place near to this one. Dammen did not force them to leave the premises, but indicated that

he would want some of the buildings, but not the house, in the spring of 1902. The evidence clearly shows that they left the place voluntarily, and the trial court so found. In the year 1903, Helgebye brought an action for a divorce against his wife. She interposed an answer and a counterclaim, setting forth grounds for a decree of divorce in her favor. She obtained a decree of divorce on March 4, 1903. Plaintiff in that case did not appear at the trial, and a stipulation was filed adjusting their property rights, and the terms of the stipulation were carried out under the decree. In this stipulation Helgebye transferred to her all his right, title and interest to the land in question; and the court, in the decree of divorce, adjudged her to be the owner of the same, as against the plaintiff and all those claiming under him. Mrs. Helgebye has brought this action against the defendant, and asks that the deed from Erickson to Dammen be set aside, and that the legal title to the land be transferred to her, as well as the possession thereof, together with the rents and profits during the year 1902. The district court denied the relief asked by the plaintiff, and dismissed the action. Plaintiff appeals from the judgment and requests a review of all the issues, under section 5630, Rev. Codes 1899.

Plaintiff's contention is that she is entitled to the land under the decree of divorce awarding it to her, that she did not join in any conveyance of the homestead to the defendant, and that the deed under which defendant claims the land is void, and conveyed no title as against her homestead right. Defendant's contention is that the contract under which the homestead was held was abandoned by the plaintiff's husband, and the homestead voluntarily abandoned by the husband and wife, who left the same intending to abandon the same, and that they established a home upon other land.

That a wife may claim a homestead in land occupied by herself and husband as a home, when the husband has only an equitable right to such land, is conceded by counsel in this case. Any equitable ownership or title, together with possession and occupation as a home, is sufficient on which to successfully base a homestead exemption. *Roby v. Bismarck Nat. Bank*, 4 N. D. 156, 59 N. W. 719, 50 Am. St. Rep. 633; *Myrick v. Bill* (Dak.) 37 N. W. 369; *Allen v. Cadwell* (Mich.) 20 N. W. 694; *Wilder v. Haughey*, 21 Minn. 101; *Snodgrass v. Parks*, 79 Cal. 55, 21 Pac. 429; *Lessell v. Goodman*, 97 Iowa, 681, 66 N. W. 917, 59 Am. St. Rep. 432; *Enc. of Law* (2d Ed.) p. 561, and cases cited. The statute defining a homestead

in this state is silent as to what title or ownership of land shall be sufficient on which to claim a homestead. The estate or interest in the land necessary to base a homestead on is not specified. In this state it has been held that the wife has no title or estate in the homestead held in her husband's name. She has the right to reside thereon and the right to hold such homestead until she joins with the husband in alienating it. *Kuhnert v. Conrad*, 6 N. D. 215, 69 N. W. 185; *Roberts v. Roberts*, 10 N. D. 531, 88 N. W. 289. It may therefore be admitted that, at the time that Erickson conveyed the land to Dammen, the land in question was occupied by the Helgebye family as their homestead. It is also beyond dispute, and is not disputed, that Erickson and Dammen knew that this land was so occupied from knowledge aside from the notice that was imputed to them by the actual occupancy of the land by the Helgebyes at this time. It is also beyond dispute that at the time that Helgebye, Dammen, and Erickson agreed that the conveyance should be made direct to Dammen, Helgebye was in default in the performance of his contract. He had made but one payment of \$93. He had raised some crops on the land during three seasons, and had not turned over any of the proceeds of these crops during two of these years. He had paid nothing since October, 1899, and was therefore in default for two successive years. It is also beyond dispute that the plaintiff signed no conveyance or writing relinquishing her homestead, nor did the husband sign or execute any writing. There was therefore no written conveyance by them, jointly or by either of them alone. Section 3608, Rev. Codes 1899, provides that "the homestead of a married person cannot be conveyed or incumbered, unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." Appellant claims that the deed from Erickson to Dammen was void under this section. That such section is authority for the holding of the homestead by the wife, notwithstanding a conveyance thereof by the husband alone, is evident from the reading of the section, in cases where there has been no abandonment, and that construction is sustained by the cases generally. The object secured by the section is the preservation of a home for the wife and family free from the power of the husband to convey or incumber the same without the wife's consent, evidenced in the manner prescribed by the statute. That such is the object secured by the section, and that courts construe the section strictly in favor of the

preservation of the homestead for the use of the family, are conceded by the respondent. His contention is that there was no homestead to be preserved to the wife at the time that the deed was made to Dammen. This claim is based on the contention that Helgebye had abandoned the contract on which the homestead was founded, and that such abandonment extinguished the contract, and the homestead right fell with it, and was also extinguished. Not only did the husband abandon his contract by virtue of which possession of the premises could have been recovered by Erickson, but Helgebye and his wife voluntarily abandoned the homestead as a residence, and went to live elsewhere. It is attempted to be shown that Mrs. Helgebye was forced to leave the home, and the foundation for the claim is that she stated on cross-examination that she was ordered to leave the place. But no facts justify any such conclusion. Her evidence does not show, when read together, that she was forced to leave the place. On the contrary, it shows a voluntary abandonment of the homestead, and it is a matter of fair inference from the testimony that she knew of all that occurred in reference to the abandonment of the contract by her husband before they left this for another home. It is argued that the husband conspired with these other parties to deprive her of her homestead right. There is no evidence to sustain any such conclusion. Helgebye was unable to go on with the contract, and desired to get rid of it and make something out of the rise in the land since he went into possession, and, having accomplished his purpose, gave up the contract and gave up the land. The rule is stated as follows, as to abandonment and failure to comply with contracts of purchase: "(5) No homestead can be acquired in lands held under a contract to purchase them, as against the vendor's claim for the purchase money, or as against his right to declare the contract forfeited and to re-enter for nonperformance by the purchaser. (6) Nor can a homestead be claimed in land held under such contract, where the contract not only has not been complied with, but has been abandoned because of inability to pay the purchase money. The homestead is lost with the loss of the rights of the purchaser under the contract." Enc. Law, vol. 15, pp. 562, 563. In *Stafford v. Woods*, 144 Ill. 203, 33 N. E. 539, the court said: "The estate of homestead, which was derived solely from the contract of purchase, was necessarily subject to the terms and provisions of that contract; and anything which put an end to the right of possession acquired under

the contract, for the same reason, put an end to the estate of homestead. That estate could have no independent existence superior to the interest in the premises out of which it was carved, but necessarily terminated with that interest. The purchaser's default in the payment of the purchase money gave the vendor the right, by electing to avoid the contract, to re-enter and take possession. Upon his making such election, the purchaser's right of possession terminated, and the estate of homestead necessarily fell with it." In *Snodgrass v. Parks*, 79 Cal. 55, 21 Pac. 429, it was said: "This is a stronger case than the one cited, as the vendees have in this case not only failed to pay, but have expressly abandoned their contract. Having done so, they cannot now be heard to assert any rights under it." And further, on page 61, 79 Cal., page 431, 21 Pac.: "It is earnestly contended that there was no forfeiture of the rights of the defendants under the contract of sale. This may be admitted. There was no forfeiture, but an abandonment and surrender of their rights, which was quite another thing." See, also, *Allison v. Shilling*, 27 Tex. 451, 86 Am. Dec. 622.

The evidence sustains the finding of intentional abandonment of the homestead. The wife does not deny that she had full knowledge of her husband's desire to get rid of his contract, and of his inability to comply with its terms, at the time that they moved to the adjoining land. She did not object to moving at any time. She made no claim that the land was her homestead until after the divorce was granted. These matters show that she intended to abandon the homestead, and are competent evidence bearing on that fact. None of the cases cited can be construed as holding that a homestead can be claimed as such after it has been voluntarily abandoned. The following authorities sustain the doctrine here laid down, and some of them go much further, and hold that the husband may, by changing his residence in good faith, deprive the wife of a homestead right in lands occupied by them, even if she continues to occupy them, and where the contract under which the homestead is held has not become forfeitable: *Guiod v. Guiod*, 14 Cal. 506, 76 Am. Dec. 440; *Hand v. Winn*, 52 Miss. 788; *Burson v. Dow*, 65 Ill. 146; *Slavin v. Wheeler*, 61 Tex. 654; *Beranek v. Beranek* (Wis.) 89 N. W. 146; *Cumps v. Kiyo*, 104 Wis. 656, 80 N. W. 937; *Thompson on Homestead and Exemption*, sections 276,

483; Waples, Homestead, p. 582, section 7. If plaintiff had remained in possession of the land, we do not determine whether or not she would then have any rights to the land as a homestead.

From what has been said, it follows that when the district court adjudged, in the divorce suit, that the plaintiff in this case be awarded the ownership of the land in question, the husband had no interest or ownership in such land, and that the decree vested no title to such land in the plaintiff. Neither she nor her husband had any right to the homestead when defendant received his deed, because the contract on which the homestead right was based was abandoned by the husband, and the homestead voluntarily abandoned by both husband and wife thereafter. If the evidence showed that there was a valid contract between Helgebye and Erickson when Erickson deeded to Dammen, and there had been no abandonment of the contract or of the homestead, still plaintiff could not recover under this complaint, nor under the evidence in the record. The defendant purchased the land in good faith, and without any fraud or fraudulent intent towards the plaintiff. Such was also the finding of the trial court. He paid full consideration for the contract. If the plaintiff had any rights under such contract, she could not have greater rights than her husband had; and in no event would her husband have the right to a deed of the land until he had fully complied with the contract, and paid for the land as therein specified. If Erickson had deeded to Dammen against Helgebye's wish and without his consent, Helgebye would have had no right to have Erickson's deed transferred to him as a matter of course. In that case Helgebye would lose no rights under his contract, but he could not demand a deed until he had complied with his contract. The plaintiff in this case asks a court of equity to set aside a deed taken in good faith, without offering to do equity by offering to comply with her husband's contract as originally made, or as modified by the parties subsequently. In a similar action it is said, in *Alexander v. Jackson*, 92 Cal. 514, 28 Pac. 593, 27 Am. St. Rep. 158: "The respondent Mary was not, however, by virtue of such relation, entitled to demand that the plaintiff should immediately make a conveyance to her of the land. Although he held the land in trust for the defendants, as above stated, still it was subject in his hands to the same superior claim for the unpaid amount of the purchase money that it was in the hands of Crocker, and, until that claim

had been satisfied, Mary could not demand a conveyance from him." See, also, *McKee v. Wilcox*, 11 Mich. 358, 83 Am. Dec. 743.

The judgment is affirmed. All concur.

(100 N. W. 245.)

NOTE—No homestead right in a building where claimant has no right or estate in land on which it is. *Mayrick v. Bill*, 3 Dak. 287, 17 N. W. 268. Owner of section of land waives homestead embraced therein by permitting its sale under execution without claiming and selecting it. *Foogman v. Patterson*, 9 N. D. 254, 83 N. W. 15. Undivided interest in land sufficient basis for homestead. *Oswald v. McCauley*, 6 Dak. 289, 42 N. W. 769; *Kuhnert v. Conrad*, 6 N. D. 215, 69 N. W. 185. Mere intention to build after long lapse of time, insufficient. *Brokken v. Baumann*, 10 N. D. 453, 88 N. W. 84. Deserted wife has no homestead in land never occupied by either as a home. *Brokken v. Baumann*, 10 N. D. 453, 88 N. W. 84. Three years absence of wife does not forfeit her homestead right. *Rosholt v. Mehus*, 3 N. D. 513, 57 N. W. 783. Joinder of wife necessary to mortgage. *First National Bank of Hastings v. Lamont*, 5 N. D. 393, 67 N. W. 145; *Boby v. Bismarck Nat'l Bank*, 4 N. D. 156, 59 N. W. 719. Unless saved in decree, wife forfeits all homestead right by her divorce. *Rosholt v. Mehus*, 3 N. D. 513, 57 N. W. 783. Alienation of homestead no fraud on creditors. *Dalrymple v. Security Loan & Trust Co.*, 11 N. D. 65, 88 N. W. 1033. Where no selection of homestead from a large body of land is made, wife's failure to join her husband in the execution of a lease thereof is not fatal thereto. *Wegner v. Lubenow*, 12 N. D. 95, 95 N. W. 442.

J. H. CLEMENTS v. A. L. MILLER, GRANT S. HAGER AND HARRISON GARNETT.

Opinion filed June 11, 1904.

All Parties to a Joint Contract Must Be Made Defendants.

1. All parties to a joint contract should be made parties defendant in an action to enforce the obligations imposed by such contract.

The Obligations of Parties to a Contract Are Joint Unless It Otherwise Appears.

2. In the absence of language in a contract showing a contrary intention, the obligations of parties to a contract are presumed to be joint, and not several.

Such Obligations Similar to Those of a Partnership.

3. The obligations assumed by parties to a joint contract of hiring are the same as those assumed by partners in a contract of similar nature, and are joint obligations.

Joint Obligations — Partnership — Parties.

4. Evidence considered, and *held*, that a copartnership relationship was not created, and that the obligations created by the contract involved in this action were joint, and that all parties thereto should be made parties in an action on the contract.

Appeal from District Court, Pembina county; *Kneeshaw, J.*

Action by J. H. Clements against A. L. Miller and others. Judgment for plaintiff, and defendants appeal.

Reversed.

Bosard & Bosard, for appellants.

In a plea of abatement for nonjoinder, proof not necessary that plaintiff knew of partnership. *Norwood v. Sutton*, 1 Cranch C. C. 327.

All joint obligors should be made parties to a suit. *Gilman v. Rivers*, 10 Peters, 298, 9 L. Ed. 432.

Where parties seek to incorporate and fail, they become partners. 85 Ill. 184. The liability of partners for debts and obligations of the firm is joint, not joint and several. *Harrison v. McCormick*, 11 Pac. 456; *Northern Insurance Co. v. Potter*, 63 Cal. 157; *Sandusky v. Sidwell*, 173 Ill. App. 493; *Slutts v. Chafee*, 4 N. W. 763; *Brown v. Fitch*, 33 N. J. L. 418; *Dobb v. Halsey*, 16 Johns. 34, 8 Am. Dec. 297; *LePage v. McCrea*, 1 Wend. 164, 19 Am. Dec. 469; *Haines v. Hollister*, 64 N. Y. 3; *Marvin v. Wilber*, 52 N. Y. 270.

In the absence of legislation to the contrary, members of a joint stock company are liable, like partners. *Hunnewell v. Willow Springs Canning Co.*, 53 Mo. App. 245; *Bane v. Clinton Loan Ass'n*, 112 N. Car. 248.

Unincorporated companies do business as partners, and all are liable and must be joined in a suit by or against the association. *Williams v. Bank of Michigan*, 7 Wend. 542; *Wells v. Gates*, 18 Barb. 554; *Hoss v. Werts*, 4 Sorg. & R. 356.

C. A. M. Spencer, for respondents.

MORGAN, J. The complaint alleges a cause of action against the defendants for materials furnished them and for services rendered for them, in all of the value of \$157.65. The defendants' answer admits that plaintiff furnished materials and performed services for them and for other persons, and alleges that such other persons are

necessary parties to the action, and that they are interested with defendants in the result thereof. In such answer the names of the persons claimed to be necessary parties are given. The answer further alleges that nothing is due on the part of any one for such services, on account of damages incurred by the performance of such services in an imperfect manner, and on account of plaintiff's incompetence exceeding the contract price of the services. The issues were submitted to a jury, and they found a verdict in plaintiff's favor for the full amount claimed. A motion for a new trial was made, based on a settled statement of the case, and was denied. Judgment was rendered on the verdict, and defendants appeal from the same.

The principal specifications of error relate to a defect of parties defendant. The nonjoinder of the parties named as necessary parties was claimed as fatal to recovery against the three defendants served with summons, by motion at the close of the testimony, and on the motion for a new trial by specifications that the evidence is insufficient to sustain a verdict against the three defendants. Exceptions were also taken to the charge of the court submitted to the jury upon the theory that the defendants would be liable if the contract was several, or joint and several. We think that the specification that the evidence is insufficient to sustain a verdict against these defendants should have been sustained and a new trial granted. The nonjoinder of the persons named in the answer as necessary parties defendant is fatal to the recovery against the defendants.

The record discloses the following facts: About fifteen of the citizens of St. Thomas, N. D., by joint action and by joint contract or subscription, built a telephone system in the village for the use of subscribers only. The subscribers agreed in writing to pay their pro rata share of the cost of the materials for use in such system, and for the work of putting such system in working operation. After such system was constructed and in operation, it was ascertained that the cost thereof to each subscriber was \$53, and the same was paid by each of said subscribers. Later, and in September, 1902, the system needed repairing and extension, as other persons desired telephones placed in their houses and became subscribers to the contract, agreeing that they would pay said sum of \$53 if the system was extended to their houses. There were about 25 additional subscribers in September, 1902. The subscribers met, and appointed the defendants herein and one Nelson managing officers,

and also a board of directors, consisting of the four persons who were officers and one T. A. Miller. These officers, as a board of control or directors, had authority to act for all the subscribers and acted for them in the management of the system, and had full control of it for the subscribers. The plaintiff dealt with this board entirely in the making of the contract and in carrying on the work that he was to do under the contract. The question is raised by the answer as to whether there is a defect of parties. Inasmuch as the complaint does not show upon its face that there is such a defect of parties, it is therefore properly raised by answer, and, if not so raised, no objection can thereafter be made that there is a defect of parties defendant. Section 5272, Rev. Codes 1899. The subscribers to this contract for a telephone system did not become associated together by securing a charter as a corporation, nor did they enter into copartnership articles, nor were their relations to each other or to the public, or their character when acting in a collective capacity as a body or through authorized agents, defined by any writing or oral agreement. The only writing spoken of in the record is the contract signed by the subscribers, agreeing to pay the cost of putting in telephones for them at the price therein specified. Who owned the property, how it could be transferred from one to another, what became of a subscriber's interest upon his removal from the village or upon his withdrawal from the company, how he might withdraw, or how new members may be added, are not hinted at in the record. These persons associated themselves together for the purpose of securing for one another a local telephone system. One witness, an officer of the company, says: "This local telephone exchange consists of a number of citizens of St. Thomas that went in to put in telephones for the convenience of those who were subscribers. We called it a 'joint-stock company'—that is what we called it. Each man paid his share. We didn't know what it would cost, but we had a writing that we would put it in and pay our share, which we did."

The record shows that they derived no pecuniary profit and were not to derive any profit out of the operation of the system. No revenue was to come in from the operation of the system. The system was an automatic telephone system, and no expense was incurred in its operation except for repairs. It does not, therefore, constitute a partnership under our statute defining a partnership as an association of persons for the purpose of carrying on business together and dividing its profits

between them. Section 4370, Rev. Codes 1899. There is nothing in the record to show that the parties intended that their relations in respect to this undertaking should be those of partners. No one of the persons thus associated together had any individual authority in the matter. All power and authority was specially delegated to the so-called "board of control." If these parties had contracted to put in this telephone system for profit from the use of telephones by the public generally, it would be deemed a partnership, and the liability of the subscribers to third persons on their contracts would be joint. Section 4394, Rev. Codes 1899; *Harrison v. McCormick*, 69 Cal. 616, 11 Pac. 456; *Insurance Co. v. Potter*, 63 Cal. 157; *Winona Lumber Co. v. Church*, 6 S. D. 498, 62 N. W. 107. It is not necessary to determine, and we do not, what this so-called "joint-stock company" was in its legal character as a collective body.

It is necessary, however, to determine with whom the contract was made, and what was the nature of the contract as to its being a joint, or a joint and several, obligation. If it was a joint obligation, all the members were necessary parties defendant and must be joined as such, if not waived by not properly raising the objection that there was a nonjoinder. If a several obligation, or a joint and several one, then all the subscribers or members need not be joined as defendants. In *Harrison v. McCormick*, *supra*, it was said: "It is well settled that parties to a joint contract must all be made defendants." Section 271, *Pomeroy's Code Remedies*, says: "When the liability is joint, all the persons upon whom it rests must be united as defendants in an action brought upon the contract. This rule is general, and applies to undertakings, obligations, and promises of all possible descriptions." Our Code lays down the same rule. Section 5232, Rev. Codes 1899. In *Harrison v. McCormick*, *supra*, under the same statute, it is said: "The rule is well settled that several persons contracting together with the same party for one and the same act shall be regarded as jointly, and not as individually or separately, liable, in the absence of any words to show that a distinct, as well as entire, liability was intended to fasten upon the promisors." Obligations imposed upon several individuals are presumed to be joint obligations, and not several. Such is the express language of section 3766, Rev. Codes 1899, and such is the general rule in the absence of statutory regulation. *Parsons on Cont.* (9th Ed.) vol. 1, p. 12; *Elliott v. Bell*, 37 W. Va. 834, 17

S. E. 399; Wharton on Cont. vol. 1, section 827; Harrison v. McCormick, *supra*; Rider L. Raft Co. v. Roach, 97 N. Y. 378. In this case the defendants were the express agents of all the parties under contract between themselves to build a telephone system. The plaintiff was to do certain work for these persons, and these persons were to pay him five dollars per day for doing it. There was no language in the contract to indicate, or which tended to indicate, that the promise to pay was other than a joint promise. No reasons exist to show that these three defendants were obligating themselves to pay for work that did not benefit them individually in any way. They, like many other of the subscribers, already had telephones in their possession and use, and no benefit is shown to result to them especially by the contract in question. Hence the contract comes within the rule that it is a joint promise of the subscribers, and imposed obligations as a whole upon them jointly, being the same obligation against the subscribers as though they were partners in fact. There was no several or individual or distinct promise assumed by any one, and no promise assumed by one in a different manner than was assumed by all. It was, therefore, a joint contract, and all parties thereto must be made parties to a suit, thereon unless waived. *Kierstead v. Bennett* (Me) 45 Atl. 42; *Detroit Light Guard Band v. First Mich. Ind. Infantry* (Mich.) 96 N. W. 934; *United Press Co. v. Abel*, 84 N. Y. Supp. 425.

There are exceptions in special cases provided for by section 3766, Rev. Codes 1899, *supra*, but none of them apply to the facts of this contract. In some cases all joint promisors need not be made parties defendant, but there is no showing here to bring the case within any of the exceptions. It is strenuously insisted by respondent that the evidence shows that the contract was made by these defendants for themselves, and that the other subscribers were not in any way mentioned by these defendants and plaintiff when the contract was entered into. The evidence conclusively shows the contrary, and shows that plaintiff was told by them that they were acting for the subscribers as their agents. Plaintiff says: "I knew these different men I have sued were the board of control before, and I knew it from the start, * * * before I did any work at all." He further says that he supposed these subscribers named in the answer were copartners for the purpose of keeping up the line, and that he learned who composed the board of control from Mr. Miller, a member of the board. The fact that plaintiff was informed

that the persons who hired him did so, not for themselves, but for the subscribers, is overwhelmingly sustained by the evidence. In fact, there is not any evidence to the contrary. It is true, as stated by plaintiff, that he dealt with no one except these defendants; but that he dealt with them as principals, or as acting for themselves, is not sustained by any fact in evidence.

A direction of a verdict for the defendant at the close of the testimony would have been proper. A new trial should also have been granted on the ground stated in the motion for a new trial, to wit, that the evidence was insufficient to sustain the verdict. It was also error to charge the jury to the effect that if, at the time the contract was made and entered into, the plaintiff understood and believed that he was contracting with the defendants individually, and the defendants did not disclose to or inform the plaintiff that the contract was not being made by them individually, but was being made by them as the agents of others, then plaintiff must recover a verdict. There was no dispute in the evidence as to the contract, and what was said when it was made, in these respects. The court also charged the jury that if the contract was not a joint, but a several, contract, the plaintiff must recover, and that, if it was a joint contract, the plaintiff could not recover. The evidence being undisputed as to the terms of the contract and whether it was joint or several, this question should not have been submitted to the jury, but the jury directed, as a matter of law, that the contract was a joint obligation, and that it created no obligation against the defendants severally. *Willcox v. Arnold*, 162 Mass. 577, 39 N. E. 414.

It follows, therefore, that the verdict must be set aside, a new trial granted, and the cause remanded for further proceedings according to law. All concur.

(100 N. W. 239.)

THONE SALEMONSON V. JULIA THOMPSON.

Opinion filed February 26, 1904.

Under Section 5630 Rev. Codes 1899, Appellant Alone Can Specify Questions of Fact for Review on Appeal.

1. Section 5630, Rev. Codes 1899, which governs the trial of actions tried to the court without a jury, gives to appellants the right to specify questions of fact for review upon appeal, but does not con-

fer the same right upon respondents. Specifications of fact inserted in the statement by a respondent, against appellant's objection, will be disregarded.

Such Specification Must Be Sufficiently Definite to Indicate Evidence to Embody in Statement of Case.

2. A question of fact specified for review in this court under section 5630, Rev. Codes 1899, must be sufficiently definite to enable the respondent to determine, for the purposes of amendment, what evidence should be included in the statement of case.

Judgment Conclusive of Debt and Its Amount.

3. A judgment regularly rendered and entered by a court of competent jurisdiction is, in the absence of allegation and proof of fraud or collusion, conclusive evidence of the debt and its amount, in an action to try title by a judgment creditor, against an alleged fraudulent grantee of the debtor.

Judgment Upon Substituted Service Conclusive as to Defendant's Interest in Property Seized.

4. A judgment against a nonresident, where jurisdiction rests only upon service by publication, and the seizure of the debtor's property under a writ of attachment, has the same conclusive effect, to the extent of the debtor's interest in the property seized, as a judgment rendered upon personal service.

Fraudulent Conveyance — Levy By Creditor Evidence of Election to Treat Transfer Void — Property Fraudulently Conveyed Subject to Levy.

5. Under section 5052, Rev. Codes 1899, "every transfer of property * * * with intent to delay or defraud any creditor or any other person of his demands, is void against all creditors of the debtor. * * *" As between the parties, such transfers are valid; but as to creditors, they are void at their election. The levy of a writ of attachment upon property transferred to defraud creditors is deemed an election by the creditor to treat the conveyance as void. Property so transferred is as much subject to a levy under execution or writ of attachment as though no transfer had been made.

Valuable Consideration and Honest Debt No Defense Where Intent Is Fraudulent.

6. A conveyance of property by a debtor, not made in good faith, but executed by the grantor and received by the grantee with intent to defraud creditors, is not relieved from the condemnation of the statute by the fact that it was given for a valuable consideration or to pay an honest debt.

Appeal from District Court, Grand Forks county; *Fisk, J.*

Action by Thone Salemonson against Julia Thompson. Judgment for plaintiff, and defendant appeals.

Reversed.

B. G. Skulason and F. B. Feetham, for appellant.

A conveyance fraudulent as to existing creditors, is fraudulent and may be avoided by subsequent creditors as well. Rev. Codes, 1899 section 5052. *Romans v. Maddux*, 41 N. W. 763; *Day v. Cooley*, 118 Mass. 527; *McLane v. Johnston*, 43 Vt. 48; *Nichols v. Ward*, 73 Am. Dec. 177; *Whitmore v. Woodard*, 28 Me. 392; *Smyth v. Carlyle*, 16 N. H. 464; 14 Enc. of Law. 269.

Defendant seduced by Myrom and pregnant by him, was a creditor at time of fraudulent transfer, if not on account of breach of promise of marriage, at least for the support of her illegitimate child. *Ingwaldson v. Skrivseth*, 7 N. D. 388, 75 N. W. 772; *Soly v. Aasen*, 10 N. D. 108; 86 N. W. 108.

The judgment in *Thompson v. Myrom*, an action for breach of promise and seduction, is conclusive, and makes the defendant herein a creditor, and such judgment cannot be impeached collaterally. 1 Black on Judgments, sections 245, 246, 252 and 294; 16 Am. & Eng. Enc. Law, 394; 17 Am. Eng. Enc. Law, 849.

Defendant became a subsequent judgment creditor in the breach of promise action and can attack the fraudulent transfer made therefor. *Soly v. Aasen*, supra; *Greer v. Wright*, 52 Am. Dec. 111 and note.

Myrom, having failed to marry defendant at the time agreed upon, made a second promise which must stand untainted by any suspicion of illegality. If the original promise was illegal, the subsequent ones were good. 4 Am. & Eng. Enc. of Law, 889; *Burke v. Shaver*, 23 S. E. 749; *Spellings v. Parks*, 58 S. W. 126; *Hotchkiss v. Hodge*, 38 Barb. 117; 5 Cyc. Law & Proc. 100; *Pyle v. Piercy*, 55 Pac. 141.

A fraudulent debtor's interest is attachable. On grounds of public policy he will not be allowed to assail his transfer; as to his creditors his conveyance is a mere nullity. *Faber v. Wagner*, 10 N. D. 287; 86 N. W. 963; *Lockren v. Rustan*, 9 N. D. 43, 81 N. W. 60; *Westervelt v. Baker*, 95 N. W. 793; *Westervelt v. Hagge*, 85 N. W. 852; 4 Cyc. Law & Proc. 562; *Welch v. Ayres*, 61 N. W. 635; *Blass v. Anderson*, 23 S. W. 94; *Brasie v. Mpls. Brewing Co.*, 92 N. W. 340.

When the grantee participates in the fraud, it makes no difference whether he pays full consideration, or how, or to whom, he pays it, the transaction is void. *Daisy Roller Mills v. Ward*, 6 N. D. 317; 70 N. W. 271; *Paulson v. Ward*, 4 N. D. 100; 58 N. W. 792; *Fluegel v. Henschel*, 7 N. D. 276; 74 N. W. 996; *Lockren v. Rustan*, supra; *Morey Bros. v. Stringer*, 95 N. W. 978; *Foley v. Doyle*, 95 N. W. 1067; *Rice et al. v. Wood et al.*, 31 L. R. A. 609, *Sweet v. Wright*, 10 N. W. 871.

R. M. Carothers and Guy C. H. Corliss, for respondent.

The payment to the grantor's creditor of the full value of the property alleged to have been fraudulently transferred, protects the grantee. *Crowninshield v. Kittridge*, 7 Metcf. 520; *Steere v. Hoagland*, 50 Ill. 377; *Clements v. Nicholson*, 6 Wall. 299, 18 Law Ed. 786; *Sprague v. Ryan*, 75 N. W. 390; *Vorhees, Miller & Co. v. Blanton*, 83 Fed. 234; *Bump on Fraudulent Conveyances*, section 500; *Gottingham v. Greeley-Barnham Grocery Co.* 30 So. 560; *Crocker v. Huntzicker*, 88 N. W. 232; 14 Am. & Eng. Enc. of Law, (2d Ed.) 347; *Morrison v. Houck*, 93 N. W. 593; *Wakeman v. Grove*, 4 Paige 23; *Goodwin v. McMinn*, 53 Atl. 762; *Ames v. Blunt*, 5 Paige 13; *Murphy v. Briggs*, 69 N. Y. 446, *Hutchins v. Sprague*, 4 N. H. 469; *Kaupe v. Briggs*, 2 Robt. (N. Y.) 459, 79 N. Y. Supp. 161; *Roane v. Bank*, 1 Head. (Tenn.) 526; *Stoddard v. Butler*, 7 Paige 163; *Stover v. Herington*, 7 Atl. 142, 41 Am. Dec. 86; *Packer v. Barker*, 2 Metcf. 423; *Chatterton v. Mason*, 86 Md. 236; *Pickner v. Wevil*, 9 Ala. 305; *Wiley v. Knight*, 27 Ala. 336; *McLear v. Letchford*, 60 Miss. 169; *Mobile Bank v. Harris*, 6 La. Ann. 811.

A creditor who takes a conveyance from his debtor as security, or in payment, is protected, although such debtor intended by the transaction to defraud his other creditors, and the favored creditor is cognizant of his purpose. *Paulson v. Ward*, 4 N. D. 100, 58 N. W. 792; 14 Am. & Eng. Enc. Law (2d Ed.) 295.

An existing creditor may take security or property on account of his debt. He does not aid the debtor in converting his property in a kind that he can run away with or conceal, as in the case of a purchase; he merely exercises his right to collect or secure his own debt. The debtor having a legal right to prefer, and the creditor a legal right to take the preference, the motive prompting such preference is immaterial. *Bump on Fraudulent Conveyance*, 187 (3d Ed.); 14 Am. & Eng. Enc. Law, (2d Ed.) 229.

The attachment, judgment, execution and sale are absolutely void. There was no personal service or appearance, and the only pretense of jurisdiction is the pretended attachment of the land; and this had been conveyed by a valid conveyance. Myrom had no interest to be attached, legal or equitable. As between two judgment creditors, he who first files his bill and serves process obtains an equitable lien upon the property superior to a judgment creditor having a prior judgment. *Chittenden v. Brewster*, 2 Wall. 191, 17 Law Ed. 839; *Burt v. Keyes*, 1 Flipp. 61; *MacCalmont v. Lawrence*, 1 Blatchf. 232; *Crawford v. Kirksey*, 55 Ala. 282; *Dargar v. Waring*, 11 Ala. 998; *Newell v. Morgan*, 2 Harr. 225; *Cole v. Mottle*, 98 Ill. 58; *Lyon v. Robbins*, 46 Ill. 276; *Kisterson v. Tate*, 94 Ia. 665, 63 N. W. 350; *Fuqua v. Bank*, 35 S. W. 545; *Richardson v. Ralfsnyder*, 40 W. Va. 15; *Hartshorn v. Eames*, 31 Me. 93; *George v. Williams*, 26 Mo. 190; *Young v. Gillespie*, 12 Heisk. 239; *Brooks v. Gibson*, 7 Lea. 271; *Smith v. Summerfield*, 108 N. C. 284.

After a fraudulent conveyance the grantor has no attachable interest in the property. *Davidson v. Burke*, 32 N. E. 514; *Lyon v. Robins*, 46 Ill. 272; *Rappleve v. Bank*, 93 Ill. 396; *Miller v. Sherry*, 2 Wall. 237, 17 Law Ed. 827; *In re Estes*, 3 Fed. Rep. 134; *Bump on Fraudulent Conveyances*, 461, 466, 490, 491 and 492; *Preston-Parton Milling Co. v. Dexter Horton & Co.* 60 Pac. 412; *Doster v. Bank*, 77 Am. St. 116.

The sole right of the creditors is to resort to equity to remove the fraudulent obstruction in the way of his enforcing his claim against the property. Rev. Codes, section 5054.

A contract is not lawful which is contrary to good morals. Rev. Codes, sections 3920, 3874.

Cross-examination showed the promise to marry was void, as it was based on the consideration of unlawful sexual intercourse. *Boigner v. Boulon*, 54 Cal. 146; *Hanks v. Naglee*, 54 Cal. 51; *Saxon v. Wood*, 30 N. E. 797; *Burke v. Shaver*, 23 S. E. 749; *Beaumont v. Reeve*, 8 Q. B. 483; *Button v. Hibbard*, 82 Hun. 289; *Baldy v. Stratton*, 11 Pa. St. 316; *Goodall v. Thurman*, 1 Head. 209; *Eve v. Rodgers*, 12 Ind. App. 623.

Despite the judgment, the grantee may show that the alleged creditor was never a creditor, when such alleged creditor assumes to attack a transfer from his alleged debtor to a third person. *Yeand v. Weeks*, 53 Am. St. 50; *Moore v. Ashton Plantation Co.* 30 So. 152; *Miller v. Miller*, 23 Me. 22; *Miller v. Johnson*, 27 Md.

6; Botwell v. McClure, 30 Vt. 674; Jenness v. Barry, 17 N. H. 549; Prescott v. Hayes, 43 N. H. 593; Sargent v. Salmond, 27 Me. 539; Church v. Chapin, 35 Vt. 223; King v. Thorp, 26 Ia. 283; Downs v. Fuller, 35 Am. Dec. 393; Vose v. Morton, 50 Am. Dec. 750; Teed v. Valentine, 65 N. Y. 471; Bruggerman v. Hoerr, 7 Minn. 377; Davis v. Davis, 25 Pac. 140; McClenney v. McClenney, 59 Am. Dec. 738; Millar v. Babcock, 29 Mich. 626; Tyler v. Pratt, 30 Mich. 63; Black v. Nease, 37 Pa. St. 433; Farris v. Dunham, 17 Am. Dec. 77.

The grantee is protected if on his own motion he pays the debts of the grantor. Longfellow v. Barnard, 79 N. W. 255; Webb v. Brown, 3 Oh. St. 246.

YOUNG, C. J. This is an action to determine adverse claims to 160 acres of land situated in Grand Forks county. The complaint is substantially in the form prescribed by chapter 5, p. 9 Laws 1901. The plaintiff alleges that she has an estate in fee simple in the premises, and is in possession; that the defendant claims an interest therein; and prays that said defendant be required to set forth such adverse claim, to the end that its validity and priority may be determined. The defendant in her answer alleges, among other things, that on and prior to the 10th day of October, 1901, the land in question was jointly owned and occupied by the plaintiff and her brother, one Charles O. Myrom, each having an undivided one-half interest; that on the above named date the said Myrom pretended to convey to plaintiff his interest therein by a warranty deed; that on the 20th day of May, 1901, prior thereto, mutual promises of marriage were made and entered between this defendant and the said Charles O. Myrom; that in the month of June, 1901, the said Myrom, under said promise of marriage, seduced the defendant and got her with child, which child was born on the 11th day of March, 1902, and is still living; that said Myrom broke his said contract of marriage, and refused to perform the same; that during the most of the time in question the said Myrom was a member of the family of the plaintiff, which consisted of plaintiff and her husband, Gunder Salemonson; that the contract of marriage and its breach, and the seduction of the defendant by Myrom, and the relations of the defendant to the said Myrom, were known at all times to the plaintiff and her said husband; that after the breach of said promise of marriage, and seduction, and with full knowledge thereof on the part of the plaintiff and her husband, "the said Charles O. Myrom, with

intent to delay the defendant in her demand for damages against him for the breach of said marriage contract, did fraudulently, voluntarily, and without consideration, by the conveyance above described, pretend to transfer to the plaintiff all his interest in said real estate; that the plaintiff's said husband, Gunder Salemonson, acted for and in behalf of the plaintiff in said transaction; that the said transfer was made in anticipation of a suit for damages which the plaintiff, her husband, and the said Charles O. Myrom expected defendant to bring, and for the purpose of covering up the property of said Charles O. Myrom and thereby defeating the claims of this defendant; that the plaintiff and her husband participated in said fraudulent scheme, and were fully cognizant of all the facts above pleaded; that by reason of said fraudulent transfer the defendant has been obstructed in her enforcement by legal process of her right to the real estate in satisfaction of her said demands." The answer further alleges that on the 11th day of March, 1902, the defendant instituted an action against Myrom to recover damages for the breach of his promise of marriage; that on the 13th day of March, 1902, a writ of attachment, issued in aid of said action, was levied upon all the right, title, and interest of Myrom in said land; that on the 1st day of July, 1902, judgment was entered in said action in favor of this defendant in the sum of \$5,030.20; that on the 18th day of July, 1902, a writ of execution issued thereon, and on the 13th day of October, 1902, the interest of said Myrom in said real estate was sold to this defendant for the sum of \$2,500, and a sheriff's certificate of sale issued to her, which sale was thereafter duly confirmed by the court. The defendant prays, among other things, that Myrom's conveyance to the plaintiff be decreed to be null and void and cancelled of record, and that the sale upon execution to this defendant be declared valid and binding as to Myrom's undivided one-half interest. The plaintiff filed a reply, in which she admits that she and Myrom were the owners of the land as alleged; that Myrom executed the conveyance in question; but denies that it was a pretended or fraudulent conveyance, or was made for the purpose of hindering or defrauding the defendant or any other person; and alleges that it was executed in good faith and for a valuable consideration; "that the interest of said Charles O. Myrom was purchased by Gunder Salemonson, the husband of the plaintiff, and that said Gunder Salemonson caused the said deed of conveyance upon said purchase to be executed to his wife, this plaintiff." The reply also denies that any marriage contract ever existed between

the defendant and Myrom, or that Myrom ever violated any marriage contract or that any action to recover damages was instituted, or that any judgment was recovered, and alleges that all proceedings in said action were utterly without jurisdiction, either over the person of said Charles O. Myrom or of the real estate described in the complaint and answer herein, and that said Charles O. Myrom was never personally served with the summons in said pretended action within the state of North Dakota, and never appeared in said action; that the only service of summons upon him was by publication, and that no property of said Myrom was ever attached in the state of North Dakota in said action. The trial court entered judgment declaring that the attachment, judgment, and execution were null and void, and that the defendant has no estate or interest in the premises. Defendant appeals.

The statement of case, which was settled pursuant to section 5630, Rev. Codes 1899, under which the case was tried, presents an anomalous condition. It includes specifications of fact for retrial in this court on behalf of the respondent as well as the appellant. The respondent injected into the statement, over appellant's objection, six specifications of fact which she desires to have reviewed on this appeal. These specifications must be disregarded. Section 5630, Rev. Codes 1899, prescribes what the statement of case shall contain, and is the source of our authority to review evidence in all cases tried thereunder. That section provides that: "A party desiring to appeal from a judgment in any such action, shall cause a statement of the case to be settled * * * and shall specify therein the questions of fact that he desires the Supreme Court to review, and all questions of fact not so specified shall be deemed on appeal to have been properly decided by the trial court. Only such evidence as relates to the questions of fact to be reviewed shall be embodied in this statement. But if the appellant shall specify in the statement that he desires to review the entire case all the evidence and proceedings shall be embodied in the statement. * * * The Supreme Court shall try anew the questions of fact specified in the statement or in the entire case, if the appellant demands a retrial of the entire case. * * *" This statute does not confer upon a respondent the right to secure a review of the evidence upon any fact. That right is conferred only upon the appellant.

Moreover, we are of opinion that the appellant's specification is insufficient to call for a review of the evidence. It is as follows: "Appellant specifies the following question of fact, which she desires the Supreme Court to review, to wit, was Julia Thompson, the above-named defendant and appellant, a creditor of Charles O. Myrom?" The vice in this question is that it does not present for examination and determination on the evidence any particular fact, but, on the contrary, calls for the deduction of a legal conclusion from indefinite and unknown facts. The trial judge found, as matter of law, that the defendant was not a creditor. We think, on the facts of this case, that the question was properly classified as one of law, and not of fact. The statute above quoted contemplates that the specification of questions of fact for review in this court shall be sufficiently specific to enable the respondent to determine, for the purposes of amendment, what evidence should be included in the statement upon the controverted question of fact. One could only conjecture as to what evidence or facts the appellant would rely upon to sustain her contention that she was a creditor. The case of *Douglas v. Richards*, 10 N. D. 366, 87 N. W. 600, is in point upon the sufficiency of this specification.

While we are not able to examine the evidence, the findings of fact made by the trial court cover all the questions in controversy, and furnish a sufficient basis for a right disposition of the case. The record contains two sets of findings. The trial court found, at the instance of the plaintiff: "(1) That previous to October 10, 1901, the plaintiff and one Charles O. Myrom was each the owner of an undivided one-half interest in said real estate, and that on said October 10, 1901, the said Charles O. Myrom, for a valuable consideration, executed and delivered to the plaintiff a warranty deed conveying to plaintiff all his said interest in said land; (2) that said conveyance was so executed and delivered by said Charles O. Myrom to this plaintiff, and for the purpose of paying certain of his debts, but with intent to defraud the defendant out of any claim which she might have against said Charles O. Myrom; (3) that the real purchaser of the interest of said Charles O. Myrom in said real estate was Gunder Salemonson, the husband of the plaintiff, and that said Gunder Salemonson purchased the said real estate with intent to defraud the defendant out of any claim which she might have against said Myrom, and with knowledge of such intent on the part of the said Charles O. Myrom, and that said Gunder Salemonson

agreed to pay said Charles O. Myrom, and said Charles O. Myrom agreed to accept, for his undivided one-half interest in said real estate, the sum of fifteen hundred (\$1,500) dollars, and that said amount was the reasonable value of his undivided one-half interest in said premises, the said real estate being worth the sum of forty-five hundred (\$4,500) dollars, and being incumbered by a mortgage for fifteen hundred (\$1,500) dollars; (4) that it was the understanding between Myrom and said Gunder Salemonson that said Salemonson should pay said fifteen hundred (\$1,500) dollars by applying the same in extinguishment of the debts of the said Charles O. Myrom, paying to said Charles O. Myrom any surplus there might be after paying his said debts, and that said Gunder Salemonson, after the execution and delivery of said deed, and between that time and March 1, 1902, paid debts of the said Myrom exceeding said sum of fifteen hundred (\$1,500) dollars; (5) that, instead of having the deed of conveyance of said land executed to himself, said Gunder Salemonson had said deed executed to his wife, the plaintiff herein, and gave her the land so purchased by him as aforesaid; (6) that subsequent to the execution and delivery of said deed the defendant levied an attachment upon the said real estate, as the property of the said Charles O. Myrom, in an action commenced by her for damages for breach of promise of marriage; and that the said Charles O. Myrom was never served personally within the state of North Dakota, and never appeared in said action, and that the only jurisdiction ever attempted to be obtained in said action over his person or property was by the levy of said attachment on said real estate, and the service of the summons upon him by publication; and that subsequently a judgment was rendered in said action, based entirely upon said attachment and said constructive service of process, and that under said judgment said defendant caused execution to be issued and the said real property sold as the property of said Charles O. Myrom, the said sale being made on the 13th day of October, 1902, and the interest of said Myrom on said sale being purchased by the defendant, and the sheriff's certificate issued by the sheriff to her; that, at the time of the execution and delivery of said deed, the said Charles O. Myrom had broken his marriage contract with the defendant, but that said marriage contract was based upon an immoral consideration, to wit, the consideration that the said Myrom should be permitted to have sexual intercourse with defendant if he would

promise to marry her, and that upon his making defendant said promise, and in consideration thereof, she permitted him to have sexual intercourse with her." The facts found on the request of the defendant are substantially those alleged in her answer hereinbefore set out.

As conclusions of law the trial court found: "(1) That the plaintiff is the owner in fee simple of all of said real estate, and that the defendant has no interest in or lien thereon; (2) that the deed of conveyance from Charles O. Myrom to the plaintiff herein was not a fraudulent conveyance as to this defendant, for the reason that the said defendant had no valid claim for damages against said Myrom; (3) that the defendant was not a creditor of said Charles O. Myrom at the time of the execution and delivery of said conveyance; (4) that the marriage contract, for the breach of which said action was instituted by defendant against said Charles O. Myrom, was a contract void because founded upon an immoral consideration; (5) that plaintiff is entitled to judgment adjudging that the defendant has no interest in or lien upon said premises, and barring and foreclosing her from any interest in or lien thereon."

This case turns upon the answer to two questions, viz.: (1) Was defendant a creditor of Myrom, and (2) was Myrom's deed to the plaintiff void as to his creditors? If either of these questions is answered in the negative, the defendant must fail, for if she is not a creditor she has no standing to attack the conveyance, however fraudulent it may be. And, even though she is a creditor, she cannot prevail if the conveyance is valid as to creditors. The judgment of the trial court is based upon the conclusion that the defendant is not a creditor. We reach the opposite conclusion. The conclusion of the trial court rests entirely upon its finding that the marriage contract, for the breach of which the defendant recovered judgment in her action against Myrom, was based upon an immoral consideration, to wit, her promise to permit him to have sexual intercourse. It has been held in numerous cases that a recovery for the breach of a marriage contract will be defeated upon proper allegation and proof that it was based upon such a consideration. Wharton on Cont. section 373; Story on Cont. section 458; *Saxon v. Wood*, 4 Ind. App. 242, 30 N. E. 797; *Hanks v. Nagle*, 54 Cal. 51, 35 Am. Rep. 67; *Boignerres v. Boulon*, 54 Cal. 146; *Steinfeld v. Levy*, 16 Abb. Prac. (N. S.) 26; *Burke v. Shaver*, 92 Va. 345, 23 S. E. 749; *Baldy v. Stratton*, 11 Pa. 316. Counsel for defendant

do not contend that this is not the law. Their contention is that the fact is otherwise, and that no such promise was made, and in support of this contention they have exhibited in their brief what purports to be all of the evidence upon which the finding rests. Inasmuch as the appellant has not specified this fact for review, we are without authority to examine the evidence to ascertain whether it is or is not true. In our opinion, the fact upon which the case was decided in the district court was not in issue and could not be placed in issue, and was therefore not a material finding in this case. We fully agree with the contention of appellant's counsel that, as matter of law, the judgment rendered in the defendant's action against Myrom for the breach of the marriage contract fixed her character as a judgment creditor, and that the question as to Myrom's legal liability to her, having been adjudged and determined in that action, is not now open to reinvestigation in this case. The decided weight of judicial opinion is to the effect that a judgment rendered by a court of competent jurisdiction, in regular course of judicial proceedings, is, in the absence of allegation and proof of fraud or collusion, conclusive evidence of the debt and its amount in an action by a judgment creditor against an alleged fraudulent grantee of the judgment debtor; and that errors or irregularities in its rendition, or laches in making defense, are determined by the judgment, and cannot be retried in a collateral proceeding against the grantee. See *Minnesota Thresher Company v. Schaack*, 10 S. D. 511, 74 N. W. 445; *Sidensparker v. Sidensparker*, 52 Me. 481, 83 Am. Dec. 527; *Swihart v. Shuam*, 24 Ohio St. 432; *Candee v. Lord*, 2 N. Y. 269, 51 Am. Dec. 294; *Wingate v. Haywood*, 40 N. H. 437; *Pickett v. Pipkin*, 64 Ala. 520; *Ferguson v. Kumler*, 11 Minn. 104 (Gil. 62); *Scott v. Wagon Works*, 48 Ind. 75; *Strong v. Lawrence*, 58 Iowa, 56, 12 N. W. 74; *Bump on Fraudulent Conv.* (3d Ed.) pp. 576, 577; *Freeman Judgm.* section 418; *Davidson v. Burke*, 143 Ill. 139, 32 N. E. 514, 36 Am. St. Rep. 367; *Quinn v. People*, 146 Ill. 275, 34 N. E. 148; *Mattingly v. Nye*, 8 Wall. (U. S.) 370, 19 L. Ed. 380; *Newman v. Willitts*, 60 Ill. 519; *Morley v. Stringer* (Mich.) 95 N. W. 978; *Pabst Brewing Co. v. Jensen*, 68 Minn. 293, 71 N. W. 384; *Moore & Handley Hardware Co. v. Curry*, 106 Ala. 284, 18 South. 46; *Bain v. Wells*, 107 Ala. 562, 19 South. 774; *Burgess v. Simonson*, 45 N. Y. 225; *Goodnow v. Smith*, 97 Mass. 69; *Carpenter v. Osborn*, 102 N. Y. 552, 7 N. E. 823; *Lewis v. Rogers*, 16 Pa. 18; *Sheetz v.*

Hanbest's Ex'rs, 81 Pa. 100; Meckley's Appeal, 102 Pa. 536; Vogt v. Ticknor, 48 N. H. 242; Forist v. Bellows, 59 N. H. 231; Bensimer v. Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 744; Needham v. Wilson (C. C.) 47 Fed. 97; Harrison v. Pender, 44 N. C. 78, 57 Am. Dec. 573; Mosgrove v. Harris, 94 Cal. 162, 29 Pac. 490; McCannless v. Smith 51 N. J. Eq. 505, 25 Atl. 211; Davidson v. Burke, 143 Ill. 139, 32 N. E. 514, 36 Am. St. Rep. 367. See, also, 2 Black, Judgm. section 605, and cases cited. Even in cases where the judgment is not considered conclusive, it is held that the defense of illegality of consideration—for instance, that it is based upon a Sunday contract or a gambling transaction—not having been interposed by the judgment debtor, cannot be taken advantage of when the judgment is collaterally offered in evidence in another action. Jenness v. Berry, 17 N. H. 549; Chicago Driving Park v. West, 35 Ill. App. 496; McCannless v. Smith, 51 N. J. Eq. 505, 25 Atl. 211. It is also well settled that a judgment obtained against a nonresident, where the jurisdiction rests only upon service by publication and the seizure of the debtor's property under a writ of attachment, has the same conclusive effect, to the extent of his interest in the property seized, as a judgment rendered upon personal service. Voorhees v. Jackson, 10 Pet. 449, 9 L. Ed. 490; Cooper v. Reynolds, 10 Wall. 309, 19 L. Ed. 931; Needham v. Willson (C. C.) 47 Fed. 97; Mosgrove v. Harris, 94 Cal. 162, 29 Pac. 490; Kane v. Cook, 8 Cal. 449; Eastman v. Wadleigh, 65 Me. 251, 20 Am. Rep. 695; Banta v. Wood, 32 Iowa, 469; Exchange National Bank v. Clement, 109 Ala. 270, 19 South. 814; Woodruff v. Taylor, 20 Vt. 65; Freeman v. Alderson 119 U. S. 185, 7 Sup. Ct. 165, 30 L. Ed. 372.

In the case at bar, the plaintiff does not assail the judgment for fraud or collusion. Neither, in her reply, does she attack it upon the ground upon which the trial court held it invalid, namely, that the marriage contract upon which it was based rested upon an immoral consideration. Her sole attack is upon the jurisdiction of the court to render it. The grounds alleged in her reply are (and she alleges no others) that there was no personal service upon Myrom, and that no property owned by him was attached. We are of opinion that the findings show jurisdiction. True, there was no personal service, but that was not essential if jurisdiction was established by a valid attachment and publication. If, as to creditors, the land involved in this action was Myrom's when the levy was made, it will be conceded that the court had jurisdiction to render a

judgment in the action which would be valid and binding to the extent of his interest. If it was not, then there was nothing for the jurisdiction of the court to rest upon, and the attachment, judgment, and sale would be nullities. The validity and effect of Myrom's deed is, then, the decisive question as to jurisdiction. It is, we think, entirely clear that it was void as to creditors. As to them it was wholly inoperative as a conveyance. The land, therefore, when seized under the writ, was Myrom's and its seizure established jurisdiction. Our statute (section 5052, Rev. Codes 1899) declares that: "Every transfer of property, * * * with intent to delay or defraud any creditor or any other person of his demands, is void against all creditors of the debtor. * * *" By section 5055, Rev. Codes 1899, the question of fraudulent intent is made "one of fact and not of law." It is expressly found that the deed was executed by Myrom "with intent to defraud the defendant out of any claim which she might have against him," and that the plaintiff's husband purchased the land with like intent. This presents a case of actual fraud participated in by both parties to the conveyance, and the finding of the fraudulent intent is conclusive against its validity as to Myrom's creditors. "A fraudulent conveyance is no conveyance as against the interests intended to be defrauded." The language of Chancellor Kent, just quoted from *Sands v. Codwise*, 4 Johns. 536, 4 Am. Dec. 308, was approved by Judge Story in *Bean v. Smith*, 2 Mason, 252, Fed. Cases No. 1,174, 18 Myer's Fed. Dec. 406, who, in speaking of the conveyances involved in that action, said: "The conveyances were in their very concoction fraudulent. They were, therefore, in the language of the statute, 'utterly void' as against creditors, and cannot be permitted to stand as a security for any advances subsequently made, or any pretended debts then due. All the reasons of public policy so forcibly urged in *Sands v. Codwise* against such an allowance command the court to be rigid in denying to those who are guilty of bad faith any such indulgence. Let them reap the due reward of their own misconduct." Our own court has adopted the same rule as to the effect of deeds fraudulent in fact. See *Paulson v. Ward*, 4 N. D. 100, 58 N. W. 792; *Roller Mill v. Ward*, 6 N. D. 317, 70 N. W. 271, and cases cited. The trial court found that the deed "was not a fraudulent conveyance as to this defendant, for the reason that the defendant had no valid claim for damages against Myrom." The sole ground of this conclusion was that the defend-

ant was not a creditor. The conclusion, resting wholly upon an immaterial finding, falls with the finding upon which it is based. Such conveyances, while valid between the parties, are void as to creditors, at their election. The levy of a writ of attachment on the property conveyed is deemed to be a declaration by the creditor of his election to treat the conveyance as void. *McKinney v. Bank*, 104 Ill. 180; *Bostwick v. Blake*, 145 Ill. 885, 34 N. E. 38; *Hall v. Stryker*, 27 N. Y. 596; *Allen v. Berry*, 50 Mo. 91; *McKee v. Gilchrist*, 3 Watts, 234. In *Hall v. Stryker*, supra, it was said, in reference to rights of creditors in the property of a debtor which has been fraudulently conveyed: "The transfer being void as to them, the law considers the property, quoad them, as still the property of their debtor. * * * When the creditor has procured legal process, such as the law allows a creditor to have against the property of his debtor, he has acquired the standing of a creditor in respect to all the property of his debtor; and that which he has conveyed with the intent forbidden by the law (the conveyance being void) is as much his, in the judgment of the law, and as fully subject to the process, as if the conveyance had not been made." In *Bostwick v. Blake*, supra, it was said that, the moment the writ of attachment is levied upon the property of the debtor, the election of the creditor to treat the conveyance as void is declared, and the attachment becomes a lien against the property, with the same effect as if the deed had never been made. "The theory of the law is that a fraudulent transfer passes nothing as against creditors. For all purposes of appropriating the property to the satisfaction of their demands, it is to be deemed vested in the debtor. *Bump on Fraudulent Conveyances*, 465." Having reached the conclusion that Myrom's deed was void as to creditors, it follows necessarily that the land was his when attached, and sustained the jurisdiction of the court to render judgment in the action. The judgment in that action did not settle the question of title, however. "Questions of conflicting titles must be settled in appropriate actions devised for that purpose." *Sedgwick & Wait on Trial of Title to Land*, section 176; *Exchange Bank v. Clement*, 109 Ala. 270, 19 South. 814, and cases cited on page 277, 109 Ala., page 816, 19 South.

We cannot agree to the contention that the conveyance is relieved from the condemnation of the statute because Myrom executed it upon "the understanding" that Salemonson would pay

him \$1,500 "by paying the same in extinguishment of his debts," and paying the surplus, if any, to him, and subsequently paid debts equivalent in amount to the value of the property. True, a debtor may pay or secure one creditor in preference to another. Section 5050, Rev. Codes 1899, expressly so declares. He may therefore convey his property to one creditor in preference to another, and such conveyances are not, for that reason, void as to creditors. The law does not look with ill favor upon the payment of honest debts, even when payment results in one creditor receiving a preference over another. But this conveyance does not come within the protection of this doctrine. Waiving the fact that neither the plaintiff nor her husband was in fact a creditor of Myrom, and the fact that not a dollar of his debts was paid by the delivery of the deed, the consideration being merely Salemonson's promise to the grantor to pay them, and the further fact that the "understanding" that the consideration was in part to be paid to Myrom's creditors was a secret arrangement between the grantor and Salemonson and was unknown to the creditors, still the deed must be held void. Not every conveyance to a creditor to pay an honest debt, or for a valuable consideration, is valid as to creditors; it must also be in good faith. Even though given to pay or secure honest debts, the instruments are void if given and received "with the intent to delay or defraud any creditor," and that is the unchallenged fact in this case. The fraudulent intent of the grantor and the complicity of the grantee vitiate the conveyance, even to the extent of depriving the fraudulent grantee of the right to relief in respect to payments made or obligations assumed. The doctrine of the cases, as enunciated in *Beidler v. Crane*, 135 Ill. 92, 25 N. E. 655, 25 Am. St. Rep. 349, is that: "A transfer of property must not only be upon a good consideration, but it must also be bona fide. Even though the grantee or assignee pays a valuable, adequate and full consideration, yet if the grantor or assignor sells for the purpose of defeating the claims of his creditors, and such grantee or assignee knowingly assists in effectuating such fraudulent intent, or even has notice thereof, he will be regarded as a participator in the fraud, for the law never allows one man to assist in cheating another." In *Union Nat. Bank v. Warner*, 12 Hun. 306, it was insisted that there was an actual consideration paid by the grantees at the time of the grant by an agreement to pay debts to certain creditors, and that the conveyance

should therefore be sustained. This was denied. The court said that the grantees "accepted the conveyance with the fraudulent design and intent on their part to hinder, delay, and defraud the creditors of the grantor. They were particeps criminis in the corrupt arrangement, and can therefore claim nothing under it, either to their own advantage or to the advantage of any one else. As is stated by Johnson, J., in *Briggs v. Merrill*, 58 Barb. 389: 'A party bargaining with a debtor, with fraudulent intent, does it at the peril of having that which he receives taken from him by creditors whom he is attempting to defraud, without having any remedy to recover what he parts with in carrying out his bargain. The law will leave him in the snare his own devices have laid.' In such case, actual payment of full value will not protect the fraudulent vendee or grantee against the claim of the creditor. As was said in *Wood v. Hunt*, 38 Barb. 302, the complicity of the grantee in the fraud of the grantor deprives him of any right to relief in respect to such payment." In support of the doctrine that the payment of a valuable consideration will not alone sustain a conveyance which is made and received with intent to delay or defraud creditors, see particularly, *Billings v. Russell*, 101 N. Y. 226, 4 N. E. 531; also, *May v. Walter*, 56 N. Y. 8; *Commercial Bank v. Bolton*, 87 Hun. 547, 35 N. Y. Supp. 138; *Fullerton v. Viall*, 42 How. Prac. 294; *Goodhue v. Berrien*, 2 Sandf. Ch. 630; *Hedges v. Payne* (Sup.) 17 N. Y. Supp. 809; *Howe v. Sommers* (Sup.) 48 N. Y. Supp. 162; *Kurtz v. Lewis Voight & Sons Co.* (Mo. Sup.) 75 S. W. 386; *Spuck v. Logan* (Md.) 54 Atl. 989; *Salzenstein v. Hettrick*, 105 Ill. App. 99; *Eickstaedt v. Moses*, Id. 634; *Colorado T. & T. Co. v. Acres Com. Co.* (Colo. App.) 70 Pac. 954; *Hedrick v. Strauss* (Neb.) 61 N. W. 928; *Landauer v. Mack* (Neb.) 61 N. W. 597; *Marcus v. Leake* (Neb.) 94 N. W. 100; *Foley v. Doyle* (Neb.) 95 N. W. 1067; *Smith v. Schwed* (C. C.) 9 Fed. 483; *Union Nat. Bank v. Warner*, 12 Hun, 306; *Pope v. Kingman & Co.* (Neb.) 96 N. W. 519; *Beidler v. Crane*, 135 Ill. 92, 25 N. E. 655, 25 Am. St. Rep. 349; *Garland v. Rives*, 4 Rand. 282, 15 Am. Dec. 756; *Morley v. Stringer* (Mich.) 95 N. W. 978; *Davis v. Leopold*, 87 N. Y. 620; *Menton v. Adams*, 49 Cal. 620; *Stovall v. Bank*, 8 Smedes & M. 305, 47 Am. Dec. 85; *Pettibone v. Stevens*, 15 Conn. 19, 38 Am. Dec. 57; *Bump on Fraudulent Conveyances*, section 628.

The district court is directed to reverse the judgment appealed from, and to enter judgment in favor of the defendant, declaring

Myrom's deed void as to this defendant, and cancelling the same of record, and confirming the defendant's interest in the premises as prayed for in her answer. All concur.

COCHRANE, J., having been of counsel in the court below, did not participate in the decision, Judge W. J. KNEESHAW, of the Seventh Judicial District, sitting in his place by request.

(101 N. W. 320.)

W. S. CONRAD AND LIBBIE ROLL v. MINA ADLER AND CHARLES ADLER.

Opinion filed March 26, 1904.

Pleading — Amendment.

1. Under the facts narrated in the opinion, from which it appears that the complaint was amended three times during the progress of the trial, it is *held* that the trial court did not err in refusing the plaintiffs' further request for leave to amend after trial.

In Ejectment Plaintiff Recovers on Strength of His Own, Not the Weakness of Defendant's Title.

2. In actions of ejectment, or actions to determine adverse claims under section 5904, Rev. Codes 1899, the plaintiff must recover, if at all, upon the strength of his own title, and not because of the weakness of the defendant's.

Same — Dismissal.

3. In this case, the plaintiffs having failed to show any title or interest in the premises in controversy in themselves, judgment dismissing the action was proper.

Appeal from District Court, Nelson county; *Fisk, J.*

Action by W. S. Conrad and Libbie Roll against Mina Adler and Charles Adler. Judgment for defendants, and plaintiffs appeal.

Affirmed.

G. A. Bangs and Robert A. Eaton, for appellants.

At common law plaintiff had to allege and prove possession and ownership of fee to maintain suit to determine adverse claim; but statutes have enlarged the remedy of quieting title both as to plaintiffs and defendants. *Holland v. Challen*, 110 U. S. 15, 28 L. Ed. 52; *Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. Rep. 129; *O'Hara v. Parker*, 39 Pac. 1004.

A legal title is unnecessary in many states. *Force v. Stubbs*, 59 N. W. 798. The common law rules as to ejectment, quia timet, and removal of a cloud have no place in the consideration of this case. Plaintiff need not "own the land." *Pierce v. Felter*, 53 Cal. 18; *Stoddart v. Burge*, 53 Cal. 394.

Plaintiff may maintain action against one whose title is weaker than his own, although such plaintiff's title is ever so defective. 17 Enc. Pl. & Pr. 362; *Brenner v. Bigelow*, 8 Kan. 496; *Giltinan v. Lemert*, 13 Kan. 476; *Keokuk Ry. v. Lindley*, 48 Ia. 11. If possession is asked, the holder of a paramount title will recover. *Duffy v. Rafferty*, 15 Kan. 9; *Simpson v. Boring*, 16 Kan. 248; *Mooney v. Olsen*, 21 Kan. 691; *Hollenback v. Ess*, 1 Pac. 275.

Possession, accompanied by claim of ownership, is evidence of fee title. *Harland v. Eastman*, 8 N. E. 810; *Keith v. Keith*, 104 Ill. 397; *Barger v. Hobbs*, 67 Ill. 592; *Davis v. Easley*, 13 Ill. 198; *Recard v. Williams*, 7 Wheat. 59; 5 L. Ed. 398; *Wilder v. City*, 12 Gil. 122.

The object of the action is to force an adverse claimant to establish or abandon his claim, not to try plaintiff's title. *Steele v. Fish*, 2 Minn. 153; *Meighen v. Strong*, 6 Minn. 11; *Wilder v. City*, 12 Gil. 122; *Walton v. Perkins*, 28 Minn. 415.

Defendant may deny plaintiff's title and put him to proof. If plaintiff fails the defendant obtains a dismissal of the suit; if he succeeds, defendant thereby becomes plaintiff. *Walton v. Perkins*, 28 Minn. 415.

The defendant may assert a counterclaim and demand affirmative relief. *Eastman v. Linn*, 20 Minn. 433.

When the defendant does this and prays judgment that his title be quieted, he waives the necessity of any proof of the statutory right to commence the action on the part of the plaintiff. *Hooper v. Henry*, 17 N. W. 476; *Windom v. Schappel*, 38 N. W. 757; *Jellison v. Halloran*, 42 N. W. 392; *Burke v. Lacock's Successors*, 42 N. W. 1016; *Mitchell v. McFarland*, 50 N. W. 610; *Kipp v. Hagman*, 75 N. W. 746; *Palmer v. Yorks*, 79 N. W. 587; 56 Ark. 93; 95 Ky. 581.

The answer of the defendant, *Mina Adler*, brings her within the rules. Lessee cannot deny his landlord's title. *Stott v. Rutherford*, 92 U. S. 107, 23 L. Ed. 486; *O'Halloran v. Fitzgerald*, 71 Ill. 53; *Hawes v. Shaw*, 100 Mass. 187; *Morrison v. Bassett*, 26 Minn. 235; *Newell on Ejectment*, 593, 594.

Defendant must first deliver possession before trying title. *Newell on Ejectment*, 356; *Bertram v. Cook*, 32 Mich. 518; 6 N. W. 868; *Towne v. Butterfield*, 97 Mass. 105; *Whiting v. Edmunds*, 94 N. Y. 314.

A husband or wife entering land in subordination to the title of the owner, cannot acquire title through the possession of his or her consort. *Bannon v. Brandon*, 34 Pac. St. 263; 1 Am. & Eng. Enc. Law, 821; *Frink v. Alsip*, 49 Cal. 103; *Davies v. Collins*, 43 Fed. 31; *Mitchell v. Murphy*, 43 Fed. 425; *Meier v. Meier*, 105 Mo. 411; *Oury v. Saunders*, 77 Tex. 278; *Hodgkin v. McVeigh*, 10 S. E. 1065.

That the attempted sale to the state was ineffectual, even if the tax had been good, is shown by the absence of certificates of sale. *Stewart v. Minneapolis & St. L. Ry. Co.* 31 N. W. 351; *Gilfillan v. Chatterton*, 33 N. W. 35; *Philbrook v. Smith*, 41 N. W. 545.

Guy C. H. Corliss, for respondent.

Prior possession can be asserted in court without title only as against a trespasser. 10 Am. & Eng. Enc. Law, (2d Ed.) 488.

In ejectment, or analogous action, chain of title must be shown back to original patentee, or that a grantor of plaintiff was in possession exercising acts of ownership. 10 Am. & Eng. Enc. Law (2d Ed.) 484.

The record is no evidence of there being an original deed in the absence of the proper foundation. *American Mortgage Co. v. Mouse River Live Stock Co.*, 10 N. D. 290, 86 N. W. 965.

Deed of attorney in fact must be made, signed and sealed in the name of his principal. See *Mechem on Agency*, sections 419, 425; 1 Am. & Eng. Enc. Law, (2d Ed.) 1036, 1041.

GLASPELL, District Judge. This action was brought to recover possession of lots 7, 8, 9, and 10, in block 19, village of Lakota, Nelson county, N. D., and damages for the withholding thereof. The complaint alleges that under a pretended tax deed the defendants took possession of the premises, and have ever since wrongfully withheld and detained the same. During such unlawful possession by defendants, the plaintiff Roll sold and conveyed by quitclaim deed her interest in said premises to plaintiff Conrad, and this suit is maintained by both said plaintiffs for the use and benefit of the plaintiff Conrad. The defendants pleaded title and possession in Mina Adler. During the progress of this cause the complaint was

amended three times, but the issue as above stated was substantially the original issue, and upon which the action was submitted and determined. After judgment, application was made for leave to amend the complaint, and to allege that the defendants, Mina Adler and Charles Adler, were and are husband and wife; that they came into possession of the premises by lease from plaintiff Roll to the defendant Charles Adler, and while in possession under such tenancy a tax deed was taken in the name of Mina Adler. It was urged that this application was made on the foundation of certain evidence introduced, and to conform the pleadings thereto. The case had been tried upon the theory that the defendants were in adverse possession under color of a tax deed, and the application, coming after several attempts at amendment before trial, and after trial and judgment, and stating a new and distinct cause of action separate and different from that first stated, and upon which the cause was tried, it was properly denied by the trial court. The cause was tried in the district court without a jury, and the seventh finding of fact recites: "That the evidence fails to show that either of the plaintiffs is the owner of or has any interest in the premises described in the complaint herein, or any part thereof." The eighth finding recites: "That the defendant Mina Adler is in possession of said premises under a claim of title under tax deeds issued to her on July 23, 1894, and that said defendant took possession of said property under the said deeds as alleged in the complaint herein, but the validity of such tax deeds is not adjudicated in this case."

It is admitted in the complaint and shown in the evidence that the defendant Mina Adler took possession of the premises and holds the same under tax deeds. The validity of such tax deeds was not determined in the district court, to which no complaint is made by the defendants. Some evidence was introduced by way of attack upon the validity of the tax proceedings, but the district court held that plaintiffs should first establish a title in Libbie Roll before she could recover in this action. Whether this is an action in ejectment, or to determine adverse claims as provided in section 5904, Rev. Codes N. D. of 1899, as amended by chapter 5, p. 9, Laws 1901, the plaintiff must rely upon her own title, estate, lien, or incumbrance. The plaintiff must have some title, either legal or equitable, under the general rule that she must recover, if at all, upon the strength of her own title, and not because of the weakness of that of the defendants. See cases cited in 17 Enc. Pl. & Pr. p. 300.

There is no question here of the possession of plaintiffs. On the contrary, the complaint alleges, and the evidence shows, that the defendants have been in possession under a claim of title ever since February 1894. The plaintiffs allege and attempted to prove that Libbie Roll was at all such times the owner in fee simple and entitled to the immediate possession of the premises in controversy. The trial court held that the evidence failed to show that either of the plaintiffs is the owner of or has any interest in the premises described in the complaint, or any part thereof. As above stated, the plaintiffs attempted to show a title from the government to Libbie Roll, and submitted the cause upon that question alone. We agree with the district court that such attempt met with complete failure. It seems unnecessary to review the evidence upon this point. The deed from plaintiff Roll to plaintiff Conrad being void under the statute (Rev. Codes, section 7002) because of defendants' adverse possession, this action cannot be maintained unless title to the plaintiff Roll is established. *Galbraith v. Paine*, 12 N. D. 164, 96 N. W. 258; *Schneller v. Plankington*, 12 N. D. 561, 98 N. W. 77. The record of certain deeds was offered in evidence without laying any foundation or making any showing that the originals were not in possession of plaintiffs, and, since all such evidence was met with proper objection, it cannot be considered. Rev. Codes 1899, section 5696; *American Mortgage Co. v. Mouse River Live Stock Co.* (N. D.) 86 N. W. 965. But should such evidence be considered, there is a break in the chain of title, a link missing, in that title appears at one time in one Joseph Gardepie, and the next grantor is one James Howard, whose authority for such conveyance nowhere appears. Counsel for appellants virtually admit that title has not been shown in the plaintiffs, but claim to recover because it was alleged and proven that plaintiff Roll was in possession of the premises before and up to December, 1890, and claiming the ownership thereof. As we have seen, the plaintiffs, who are out of possession bring this action to recover possession from the defendants, who are in present possession and claiming ownership. Under such circumstances the plaintiff must rely upon her own title or interest in the premises, and, having failed in showing any such interest or title in herself, she has no right to call upon the defendants to defend their title or possession. *San Francisco v. Ellis*, 54 Cal. 72; *Walton v. Perkins*, 28 Minn. 413, 10 N. W. 424.

In conclusion, we agree with the trial court that the plaintiffs have failed to show any title or interest in the premises, and that the action must be dismissed. The judgment of the district court is affirmed. All concur.

COCHRANE, J., having been of counsel, took no part in the above decision; Judge GLASPELL, of the Fifth judicial district, sitting in his place by request.

(100 N. W. 722.)

W. E. HAYES v. MARTHA T. COOLEY AND A. W. COOLEY.

Opinion filed June 14, 1904.

The Damages for Breach of Contract Under the Code Are Same as at Common Law.

1. The rule laid down in section 4978, Rev. Codes 1899, for measuring damages which are recoverable for a breach of contract, is, in effect, the common-law rule, namely, compensation for all detriment proximately and naturally caused by the breach.

On Breach of Contract to Thresh Grains, Loss of Grain by Exposure Too Remote as an Element of Damages.

2. In an action for damages for the breach of a contract to thresh grain, which is not entered into under such special or exceptional circumstances that it may be reasonably inferred that other than the ordinary liability was contemplated by the parties, the loss of grain by exposure to storms is a remote, and not a proximate, consequence of the breach, and will not sustain a recovery.

Special Circumstances — Pleading.

3. Where, in such an action, one relies upon special circumstances attending the execution of the contract to show that other than the ordinary liability was contemplated, it is necessary to allege and prove them; otherwise the contract will be considered as having been made with reference to only such liabilities as would ordinarily follow its breach.

Appeal from District Court, Steele county; *Pollock, J.*

Action by W. E. Hayes against Martha T. Cooley and A. W. Cooley. Judgment for plaintiff, and defendants appeal.

Affirmed.

Morrill & Engerud and *E. J. McMahon*, for appellant.

If by the thrasher's delay crops are exposed to storms, the fault is his and he must pay for them. Our statute on the rule of damages was intended to adopt the rule recognized by the great weight of modern authorities. Our statute is adopted from Field's Code, New York, which has excluded a clause therefrom, to wit: "Which the party in fault had notice at the time of entering into the contract or at any time before the breach, and while it was in his power to perform the contract upon his part." This is considered to be a proper restriction upon the measure of damages, and such limitation is recognized and adopted in several English cases. See *Hadley v. Baxendale*, 9 Exch. 341; also American cases, *Gee v. Ry. Co.* 6 H. & N. 211.

Our statute was intended to adopt the rule recognized by the great weight of authority. *Hauser v. Pearse*, 13 Kan. 104; *Hammer v. Schoenfelder*, 47 Wis. 455, 2 N. W. 1129; *Holt Mfg. Co. v. Thornton*, 68 Pac. 708; *Schoemaker v. Acker*, 48 Pac. 62; *Goodloe v. Rogers*, 61 Am. Dec. 205; *Baldwin v. Blanchard*, 15 Minn. 489; *Hobbs v. Davis*, 30 Ga. 423; *Passenger v. Thornton*, 34 N. Y. 634; *McAfee v. Crofford*, 13 How. 447, 14 L. Ed. 217.

Asa J. Styles and F. W. Ames, for respondent.

The rule limiting the recovery of damages to the natural and proximate consequences of the act complained of is universally admitted. *Dubuque v. Dubuque*, 30 Ia. 176.

There is no difference in the case where a piece of farm machinery is to be furnished for use in securing a crop, from where one is hired to thresh a crop; or where a servant leaves his master's service when harvest is on. Loss of crop is too remote as an item of damages. *Fuller v. Curtis*, 100 Ind. 237, 50 Am. Rep. 786, 5 Am. & Eng. Enc. Law, (1st Ed.) 14; *Reich v. Bolch*, 27 N. W. 507; *Sycamore Marsh Harvesting Co. v. Sturm*, 13 N. W. 202; *McEwen v. McKinnon*, 42 Am. Rep. 458, 11 N. W. 838, 8 Am. & Eng. Enc. Law, (2d Ed.) 583; *Brayton v. Chase*, 3 Wis. 456.

Loss of crop is too remote to be an element of damages. *Prosser v. Jones*, 41 Ia. 674; *Fuller v. Curtis*, 50 Am. Rep. 786.

YOUNG, C. J. The plaintiff seeks to foreclose a thrasher's lien for threshing certain grain, consisting of wheat, oats, and barley, which was grown by the defendants in the season of 1902. The answer raises no issue as to the quantity of grain threshed by the plaintiff or as to the amount of his lien, but sets up a counterclaim

for damages for detriment alleged to have been sustained by reason of plaintiff's breach of his contract to thresh defendant's flax crop. The trial court found that "the plaintiff agreed to thresh the defendant's crop of flax, consisting of two hundred acres, at eighteen cents per bushel, said flax threshing to be done after the plaintiff had finished threshing for one Hedington; that plaintiff wholly failed to perform this contract; that the defendants used due diligence to get said flax threshed by others in the fall of 1902, and did procure one hundred acres of same to be threshed in the fall of 1902 at a cost to the defendants of \$351.54 more than the price at which the plaintiff had agreed to thresh the same, the balance of the flax not being threshed during the said fall; that on said one hundred acres of flax so threshed in the fall of 1902 there was one bushel per acre wasted by reason of delay in threshing." The court also found that 400 bushels of flax was lost on the other hundred acres, which was not threshed during that fall, and that the value of flax was 70 cents per bushel. As conclusions of law, the court held: (1) That the defendants were entitled to recover, as damages for the breach of the contract, the sum they had to pay for threshing their flax in excess of the amount for which the plaintiff had agreed to thresh it, to wit, \$351.54; (2) that the defendants were not entitled to recover for the 500 bushels of flax which was lost during the delay in threshing. The defendants have appealed from the judgment, and assign error upon the last named conclusion.

But one question is presented on this appeal, and that is whether the defendants are entitled, as matter of law, to recover the value of the 500 bushels of flax. The defendants contend that the trial court erred in rejecting this item of damage, and that the judgment should therefore be modified in this respect. The rule for measuring damages which are recoverable for a breach of contract, although variously stated, may be said to be compensation for all detriment proximately and naturally caused by the breach. Our Code (Rev. Codes 1899) section 4978, states the rule as follows: "For the breach of an obligation arising from contract the measure of damages, except when otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary courses of things would be likely to result therefrom. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." It is not claimed

that this statute either restricts or enlarges the common-law rule which has been recognized and applied in hundreds of cases in England and in this country. On the contrary, there is reason to believe that the codifiers attempted to embody in this section the rule of damages laid down in the leading cases of *Hadley v. Baxendale*, 9 Ex. 341, 23 L. J. Ex. 179, 17 Jur. 358, 26 E. L. & E. 398, and *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718, and the series of decisions following the rules therein formulated. See 1 *Sedgwick on Damages*, sections 144-159, and 1 *Sutherland on damages*, section 50. In *Hadley v. Baxendale* the court said: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." In *Griffin v. Colver* it was said that: "The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract—that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed. The familiar rules on the subject are all subordinate to these. For instance, that the damages must flow directly and naturally from the breach of contract is a mere mode of expressing the first; and that they must not be remote, but proximate, consequence of such breach, and must be not speculative or contingent, are different modifications of the last." For other cases in which the rule is discussed see *Sedgwick on Damages*, *supra*. It is apparent, we think, that damages which are described as the "natural consequences of a breach" do not differ from those "which in the ordinary course of things would be likely to result therefrom," and that the rule authorizes compensation for all detriment which follows as a natural and proximate consequence of the breach, and prohibits a recovery for damages which are not natural and proximate consequences. In this, as in every case of this character, the difficulty lies, not in the rule, but in its application. The question is whether the destruction of the flax, which the trial court found was lost and destroyed after the plaintiff's breach of contract, and before the crop was finally

threshed, was the natural and proximate consequence of the plaintiff's failure to do the threshing at the time agreed upon. If it was, the defendants are entitled to recover therefor. If it was not, their loss is not within the rule of damages, and they cannot recover. The findings of fact do not state what the immediate and moving cause of the loss was. Neither is the condition of the flax shown—that is, whether it was loose upon the ground, in shock, or in stack. The argument of appellant's counsel assumes that the loss occurred as a result of exposure to storms. However that may be, it is certain that it was from a cause for which the plaintiff was not responsible under his contract. In other words, it was directly from a cause over which he had no control, which operated after the time when he should have completed the threshing. The most that can be said is that if he had performed his contract the flax would not have been exposed to the storms which destroyed it.

Upon the facts of this case we are compelled to hold, both upon principle and authority, that the defendants cannot recover the damages in question. The fundamental error in their contention lies in the assumption that where a thresher has, by failure to perform his contract, exposed crops to storms, and they are thereby destroyed, the loss is the natural and proximate consequence of his breach of contract. It is true, subsequent events may, and in this case they do, show that the loss would not have occurred but for the delay; but the indisputable fact remains that the storm is the direct and efficient cause of the loss, and for such loss, save under contracts resting upon exceptional circumstances, to which we will hereafter refer, he is not liable. It is well settled that, where one's failure to perform his contract merely exposes property to destruction by causes for which he is not responsible, the supervening cause, and not his failure to perform, is the proximate cause of the loss. This principle has been repeatedly applied in cases where liability was sought to be established against common carriers for losses of property by storm and flood, subsequent events showing that the loss would not have occurred but for the carrier's breach of contract. 1 Sedgwick on Damages, section 152; *Daniels v. Ballentine*, 23 Ohio St. 532, 13 Am. Rep. 264; *Jones v. Gilmore*, 91 Pa. 310; *Dubuque W. & C. Ass'n v. Dubuque*, 30 Iowa, 176; *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695; *Denny v. N. Y. C. Ry. Co.*, 13 Gray (Mass) 481, 74 Am. Dec. 645; also, *Memphis Railroad Co. v. Reeves*, 10 Wall. U. S. 176, 19 L. Ed. 909, in which the doctrine laid down in

the two cases last cited was expressly approved. In *Morrison v. Davis*, supra, goods which were being transported on a canal were injured by the wrecking of the boat, caused by an extraordinary flood. It was claimed that a lame horse used by the defendants delayed the boat, which would otherwise have passed the place where the accident occurred in time to avoid the injury. The court held that the proximate cause of the disaster was the flood, and the delay caused by the lame horse the remote cause; and that the maxim, "*Causa proxima non remota spectatur*," applied as well to the contracts of common carriers as to others. In *Denny v. R. R. Co.* supra, the defendants were guilty of negligent delay in transporting wool from Suspension bridge to Albany, and, while in their depot at the latter place a few days after, it was submerged by a sudden and violent flood from the Hudson river. The court held that the flood was the proximate cause of the injury, and the delay in transportation the remote one. For the same reason it has been held that where one who has been employed as a farm laborer in producing and caring for crops leaves before his term has expired, and a loss of crops ensues, the loss is too remote, and is not such a natural and proximate consequence of the breach of the contract as will authorize a recovery. *Peters v. Whitney*, 23 Barb. (N. Y.) 24; *Riech v. Bolch*, 68 Iowa, 526, 27 N. W. 507. See, also, *McDaniel v. Crabtree*, 21 Ark. 431; *Hobbs v. Davis*, 30 Ga. 423; *Sledge v. Reid*, 73 N. C. 440; *Jackson v. Hall*, 84 N. C. 489; *Luce v. Hoisington*, 56 Vt. 436. More clearly in point are those cases in which it is held that, "in actions for breach of an agreement to put a harvester in first-class order to enable the owner to cut and bind his grain therewith, damages arising from the loss of crops by reason of the machine not being in condition to cut and save the same are remote, and not the natural and proximate consequences of the act complained of, and are not recoverable." *Osborn v. Poket*, 33 Minn. 10, 21 N. W. 752; *Wilson v. Reedy*, 32 Minn. 256, 20 N. W. 153; *Fuller v. Curtis*, 100 Ind. 237, 50 Am. Rep. 786; *Sycamore M. H. Co. v. Sturm* (Neb.) 13 N. W. 202. The question we are considering was directly in issue in *Prosser v. Jones*, 41 Iowa, 674. In that case plaintiff sought to recover damages for injury to his grain consequent upon the defendant's refusal to thresh it. The court held that the loss was too remote to be recovered, and said: "The defendants undertook to do the threshing within a time fixed after notice to them. The contract cannot be interpreted so that

it may be inferred that damages of this kind were within the contemplation of the parties when it was executed. The law does not hold one liable for all the consequences that may follow the breach of his contract. If it were so, his liability would be without a limit, for it would continue as far as the consequences of his act could be traced. But the law wisely limits liability to the direct and immediate effects of the breach of a contract. The losses and expenses set up in the petition are not of this character. They resulted remotely from the fact that defendants failed to thresh the grain, and are not the natural and proximate consequences of defendants' breach of the contract. Such damages are not recoverable."

So far as we are advised, no court of last resort has sustained a recovery for loss of crops in an action for the breach of an ordinary threshing contract. It is true—and in this the cases are agreed—a contract may be made under such exceptional and special circumstances that the loss of crops by storm, and a liability therefor, may reasonably be said to have been within the contemplation of the parties when they made it, and thus be considered the natural and proximate consequences of the breach. In such cases compensation for the loss may be recovered. Such is the case of *Sneed v. Ford*, 1 E. & E. 602. *Houser v. Pearce*, 13 Kan. 104, announces no different rule. Both of these cases turned upon the exceptional circumstances under which the contracts were made, and do not modify the general rule which restricts the measure of damages to compensation for the detriment naturally and proximately caused by the breach. The findings in this case merely present the breach of an ordinary contract to thresh grain. The loss of crops which may follow the breach of such a contract is, as we have seen, a remote, and not a natural and proximate, consequence of the breach. If the contract in question in this case was in fact made under such special and exceptional circumstances that it could reasonably be concluded that the parties in making it contemplated that a loss by storm would follow its breach, it was necessary both to allege and prove the facts in order to thus characterize the contract and establish the plaintiff's liability for such loss. This was not done.

Judgment affirmed. All concur.

(100 N. W. 250.)

DAMAGES.

NOTE—See reporter's note to *Bidgood v. Monarch Elevator Co.* on "damages," 9 N. D. 630. Measure of damages for breach of contract to buy ma-

chine and attachments is difference between contract price and market value. *Minn. Thresher Mach. Co. v. McDonald*, 10 N. D. 408. Exemplary damages, see *Lindblom v. Sonsteli*, 10 N. D. 140, 86 N. W. 357. Damages in contempt are limited to costs and expenses incurred by party because of the act of the accused. *Twp. of Noble v Aasen*, 10 N. D. 264, 86 N. W. 742. \$800 in malicious prosecution not excessive. *Merchant v Pielke*, 10 N. D. 48, 84 N. W. 574. On breach of contract to sell bank stock, damages are the excess of the value of the property to the buyer, over the amount due on the purchase price. *Patterson v. Plummer*, 10 N. D. 95, 86 N. W. 111. On breach of contract to exchange wheat, the measure of damages is the excess, if any, of the value of the property to the buyer over the amount that would be due the seller if the contract had been fulfilled. *Talbot v. Boyd*, 11 N. D. 81, 88 N. W. 1026. To authorize treble damages for forcible ejectment, the entry must be forcible. *Wegner v. Lubenow et al.*, 12 N. D. 95, 95 N. W. 442. Damages for pain and mental suffering recoverable, although not specially pleaded. *Gagnier v. Fargo*, 12 N. D. 219, 96 N. W. 841. On breach of contract to convey land, the measure of damages is the money paid on the contract with interest, if the vendor retains possession, and without interest if vendee retain possession. *Kicks v. Bank*, 12 N. D. 576, 98 N. W. 408. Mover of houses in streets of a city is liable to damages to a telephone company whose lines he injures. *N. W. Tel. Co. v. Anderson*, 12 N. D. 585, 98 N. W. 706. Where exemplary damages may be awarded, proof of defendant's wealth is proper. *King v. Hanson*, 13 N. D. 85, 99 N. W. 1085.

STATE EX REL ATTORNEY GENERAL V. DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT, S. L. GLASPELL, PRESIDING
JUDGE.

Opinion filed June 14, 1904.

Mandamus to Court — Remedy by Appeal.

1. In an action prosecuted in the name of the state, on the relation of the attorney general, for the purpose of removing a sheriff from office for alleged acts of malfeasance, founded upon section 5743 et seq., Rev. Codes 1899, in which action a motion to suspend the officer pending trial, pursuant to section 363, Rev. Codes 1899, was made, the district court, on objection of the defendant, decided that it was without jurisdiction to suspend and without authority to try defendant for his removal from office in this form of action, and dismissed the motion and case. This was a judicial determination by the court of a matter properly before it, and, whether right or wrong, will not be reviewed by mandamus. Relator's remedy is by appeal.

Mandamus to Inferior Court Lies Only Where Latter Refuses to Take Jurisdiction, Not Where it Takes Jurisdiction, Decides and Dismisses.

2. The rule that an inferior court will be required by mandamus to proceed and hear a case properly before it, but which it has refused

to hear for the mistaken reason that it is without jurisdiction, has no application where the court has taken jurisdiction of the case, and, in the exercise of the judicial function, has decided upon a question submitted to it for determination that the action is without authority of law to accomplish the desired purpose, and that the plaintiff has mistaken its remedy, and dismissed the case for this reason.

Proceeding in mandamus on the relation of the Attorney General against the district court of the Fourth Judicial District; *Glaspell, J.*

Alternative writ quashed and proceeding dismissed.

C. N. Frich, Attorney General, *Charles E. Wolfe*, *Aaron J. Bessie*, and *Morrill & Engerud*, for relator.

The court refused to entertain the application, hear proof and decide the motion on the ground that it had no jurisdiction to do so. Under such circumstances mandamus is the proper remedy. 19 Am. & Eng. Enc. of Law, 827.

It is doubtful if the order dismissing the motion is appealable; if it is, the remedy is neither "adequate" nor "speedy," and plaintiff would be entitled to mandamus. Rev. Codes, 6111.

The other remedy which will bar special proceedings must be one which "will set aside and annul the void proceedings of which the petitioner complains." *State ex rel Enderlin State Bank v. Rose*, 4 N. D. 319, 58 N. W. 514.

Plaintiff is entitled not only to have a specific, adequate legal remedy, but one competent to afford relief upon the very subject matter of application, and equally convenient, beneficial and effective as by mandamus. *California Pacific R. R. Co. v. Central Pacific R. R. Co.* 47 Cal. 528.

Plaintiff claims the right to produce proof that the sheriff may be suspended, which right the trial court has denied. If an appeal lies from the order, it is neither adequate nor speedy, and plaintiff, if there exists good grounds, is entitled to his immediate removal. If appeal were the only remedy, the accused would retain office until fall and such delay would defeat the object sought and render the remedy useless. Under such circumstances the right to appeal never supersedes the special proceeding. *State ex rel Bank v. Johnson*, 79 N. W. 1081; *In re North Alabama Development Co.* 30 U. S. App. 646, 71 Fed. 764; *State v. Murphy*, 6 Pac. 840; *State v. Judge*, 52 La. Ann. 1275, 27 So. 697; *People ex rel Pace v. Van Tassel*, 43 Pac. 625; *City of Huron v. Campbell*, 53 N. W. 182; *Terrall*

v. Greens, 31 S. W. 631; Merced Mining Co. v. Fremont, et al., 7 Cal. 130; T. & B. C. R. v. Iosca Circuit Judge, 7 N. W. 65.

The statute in dealing with the writ of certiorari uses the language "A writ of certiorari may be granted by the Supreme Court and District Court, when inferior courts etc. have exceeded their jurisdiction, and there is no appeal, nor any other plain, speedy and adequate remedy." Rev. Codes, 6098.

In dealing with mandamus, reference to an appeal is omitted. Rev. Codes, 6111.

The court held that an officer could not be removed by civil action even in the name of the state; that the proceeding by accusation under sections 7823-7838 is the exclusive method of removal. Section 197 of the constitution empowers the legislature to provide for the removal of officers not subject to impeachment, for misconduct, malfeasance, crime or misdemeanor. Under this authority the legislature enacted section 361, Rev. Codes, which provides that "All district, county, township, city, municipal, or state officers, not liable to impeachment, * * * shall be subject to removal from office for misconduct, malfeasance, crime or misdemeanor, etc." Rev. Codes, section 5741 prescribes the procedure by civil action. Rev. Codes section 7823, etc., prescribes the criminal procedure.

An officer, guilty of misconduct for which the statute and constitution say he ought to be removed, ought not to be permitted to remain in office until by the slow process of criminal law a judgment of conviction is obtained. The state, apart from the people of the local community, has an interest in the integrity and competency of the officers entrusted with the execution of the state laws. If it has such an interest it must have the means of protecting them. Chapter 24, of the Code of Civil Procedure was designed to enable the state by its attorney general to vindicate its authority independently of local citizens and local officials.

When a statute enumerates acts which shall be sufficient cause for removal, it is the same as if it said that the enumerated acts shall cause a forfeiture of the office. Commonwealth v. McWilliams, 11 Pa. St. 61; Commonwealth v. Walter, 83 Pa. St. 105; Royall v. Thomas, 28 Grut (Va.) 130; Bradford v. Territory, 37 Pac. 1061; Bradford v. Territory, 34 Pac. 66; State v. Allen, 5 Kansas 213; Graham v. Cowgill, 13 Kans, 114. Plaintiff's view is supported by Wishek v. Becker, 10 N. D. 63, 84 N. W. 590.

As to right of suspension pending a hearing, see, *State ex rel Clapp v. Peterson*, 52 N. W. 655; *State ex rel Douglas v. Megaarden*, 88 N. W. 412.

IN REPLY.

The peremptory writ should be directed to the District Court of the Fourth Judicial District and served upon Judge Lauder as the presiding judge of that Court. *People ex rel v. Champion et al*, 16 Johns. 61.

In case of the commissioners of highways of a township, the names might be omitted and the commissioners of the town proceeded against, whoever they might be, and if as commissioners they disobey they would incur personal responsibility. *State ex rel Grady v. Chicago M. & N. Ry. Co.*, 48 N. W. 243.

Directions are to a railroad company to put in a crossing without naming the officers having that duty in charge. *Ex parte Parker*, 131 U. S. 221, 9 Sup. Ct. Rep. 708; *Williams v. New Haven*, 68 Conn. 263; *Glencoe v. People*, 78 Ill. 382; *Chicago v. Sansum*, 87 Ill. 182; *State ex rel Hastouck v. City of Milwaukee*, 25 Wis. 122; *State v. Bailey*, 7 Iowa 390; *Brown v. Railway Co.* 53 N. J. L. 156; *Boody v. Watson*, 64 N. H. 162, 9 Atl. 794; *Pegeam v. County*, 65 N. C. 114; *Thomas v. County*, 66 N. C. 522; *Enfaula v. Hickman*, 57 Ala. 338; *Davenport v. Lord*, 9 Wall. 409, 76 U. S. 409, 19 L. Ed. 704; *Wren v. Indianapolis*, 96 Ind. 213; *St. Louis County Court v. Sparks*, 10 Mo. 117.

Where proceedings are commenced against too many defendants, it is not fatal to the application; the writ will be denied as to the unnecessary parties and issued as to the proper parties. *Fisher v. Charleston*, 17 W. Va. 628; *State ex rel Clark v. Long*, 37 W. Va. 266, 16 S. E. 578; *People v. Civil Service Boards*, 17 Abb. N. Cas. 64; *Leeds v. City*, 52 N. J. L. 332; *State ex rel Smith v. Board of Sup'rs of Town of Leon*, 28 N. W. 140.

The joinder of unnecessary parties defendant, is not grounds for dismissal or refusing relief as to proper parties. *State ex rel Hill v. Superior Court of King Co. et al.*, 30 Pac. 82.

W. S. Lauder, and *Purcell, Bradley & Divet*, for respondent.

The alternative writ is fatally defective because of a misjoinder of parties respondent. 13 Enc. Pl. & Pr. 655; *State ex rel Hill v. Superior Court of King Co. et al.*, 30 Pac. 82; *People v. Yeates*,

40 Ill. 126 ; *State v. Township*, 10 N. J. L. 292 ; *Columbia County v. King*, 13 Fla. 470 ; *Bonner v. Adams*, 65 N. C. 639.

Relator has another plain, speedy and adequate remedy at law and mandamus will not lie. He has two methods of procedure :

First. By appeal, writ of error, certiorari, to review the action of the trial court.

Second. Special statutory procedure for the removal of officers, Rev. Codes, 7838.

While it has been held that even where the right to appeal exists, such appeal may not be adequate on account of the circumstances and nature of the subject matter, but this case does not present such exceptional circumstances as to warrant invoking the doctrine. If the remedy by appeal is not adequate the remedy available to the relator under the provisions of section 7838, Rev. Codes, is in every sense plain, speedy and adequate. If there is any other remedy by which the same ultimate right may be obtained, mandamus will not lie. *State ex rel Young v. Osborne*, 83 N. W. 357 ; *State v. Miley*, 22 O. St. 534 ; *State v. Court*, 38 N. J. L. 182 ; *Territory v. Cavanaugh*, 3 Dak. 325 ; *Railway Co. v. State*, 25 Ind. 177 ; *State ex rel Wolff v. Board of Supervisors of Sheboygan County*, 29 Wis. 79 ; *People ex rel O'Brien v. Adams*, 22 Pac. 826.

Under chapter 24, the substitutionary remedy limits the relief that could be obtained thereunder to that formerly obtainable by quo warranto. The statute speaks its own construction, viz: "Remedies formerly attainable by the writ of quo warranto and proceedings by information in the nature of quo warranto may be obtained by a civil action under the provisions of this chapter." The relief obtainable under this remedy is that of removing and evicting from office a usurper who has intruded into an office, or persists in holding or performing the functions of such office, after a vacancy has occurred therein, and that the remedy cannot be invoked for removal for official misconduct. *State ex rel Vance v. Wilson*, 2 Pac. 828 ; *People ex rel Thomas, etc. v. Goddard*, 8 Pac. 927 ; *Wishek, v. Becker*, 10 N. D. 63, 84 N. W. 590.

A further reason why an action in the nature of quo warranto cannot be maintained is that such remedy can never be invoked when the causes for removal are prescribed by statute, if the statute also prescribed a special method of removal which is adequate. *State ex rel Vance v. Wilson*, 2 Pac. 828 ; *Wishek v. Becker*, 10 N. D. 63, 84 N. W. 590 ; *State v. Hickson*, 27 Ark. 398 ; *Tarbox v. Sughrue*,

12 Pac. 935; *State ex rel Simpson v. Dowlan*, 24 N. W. 188; *State v. McLain*, 50 N. E. 907.

The court has already acted and judicially determined and passed upon the question before it, and proceeded in accordance with such judicial determination and findings of the court to a final judgment. If the court were wrong in its determination, it is but a judicial error, by reason of an erroneous interpretation of the law to be reviewed only by a writ of error or an appeal, and not by mandamus. 13 Enc. Pl. & Pr. 539; *People v. Sexton*, 24 Cal. 79; *Francisco v. Manhattan Ins. Co.* 36 Cal. 283; *Davis v. Wallace*, 38 Pac. 1107; *State v. Smith*, 19 Wis. 531; *Ex Parte DeMoines & Minneapolis R. R. Co.*, 103 U. S. 794, 26 L. Ed. 461. *Ex Parte Hurn*, 13 L. R. A. 120 and note.

If the court has authority to decide questions of law or fact, mandamus will not issue to state what the decision will be. *Benedict v. Howell*, 13 N. J. L. 221; *In re Rice*, 155 U. S. 396, 15 Sup. Ct. Rep. 149; *In re Parsons*, 150 U. S. 150, 14 Sup. Ct. Rep. 50; *State ex rel N. P. R. R. Co. v. Judge of District Court*, 3 N. D. 43, 53 N. W. 433; *In re Morrison*, 147 U. S. 14, 13 Sup. Ct. Rep. 246; *Ex parte B. & O. R. R. Co.*, 108 U. S. 566, 27 L. Ed. 812; *Chine Judge v. Railway Co.*, 3 S. W. 18; *Ex parte DesMoines & Minneapolis R. R. Co.* 103 U. S. 794, 26 L. Ed. 461; *Ex parte Max Newman*, 81 U. S. 152, 20 L. Ed. 877; *Cattermole v. Ionia Circuit Judge*, 99 N. W. 1.

The insufficiency of the plaintiff's complaint, to entitle it to relief or to permit the introduction of testimony was raised, and judicially determined, that said complaint did not state facts sufficient to constitute a cause of action or permit the introduction of testimony over objection. To issue the writ of mandamus would be to direct the District Court to reverse its own judgment upon the sufficiency of the complaint and receive testimony thereunder. This under all of the authorities cannot be done. *Shine Judge v. Kentucky R. R. Co.*, 3 S. W. 18; *Tibbetts et al. v. Campbell*, 27 Pac. 531; *Scott v. Superior Court*, 16 Pac. 547; *State v. First Judicial District Court*, 40 Pac. 600; *In re Hawkins*, 147 U. S. 486, 13 Sup. Ct. Rep. 513; *In re Morrison*, 147 U. S. 14, 13 Sup. Ct. Rep. 246.

All that any court will ever do by mandamus to an inferior court is to direct that it take jurisdiction and proceed according to law. *Poblerts v. Hellsworth*, 10 N. J. L. 57.

The granting or withholding of mandamus is largely discretionary; where the granting of the writ will lead to greater complications than its refusal, the writ will be denied. *People ex rel McMackin, v. Board of Police of City of New York*, 107 N. Y. 235, 13 N. E. 920; *People v. Commissioners*, 21 How. Pr. 335.

COCHRANE, J. An action was commenced by the Attorney General in the name of the state against George E. Moody, the sheriff of Richland county, under chapter 24, Code Civ. Proc. (sections 5741, 5743, et seq., Rev. Codes 1899), for the purpose of securing his removal from office. The complaint alleged as grounds for removal many acts of malfeasance, misfeasance and nonfeasance in office. After the commencement of the action an application was made, upon notice, for an order suspending the defendant from the functions of his office until the final determination of the case upon the merits, pursuant to section 363, Rev. Codes 1899. Judge Lauder, of the Fourth Judicial District, with the consent of the counsel on either side, requested Judge Glaspell, of the Fifth Judicial District, to take jurisdiction of and to try and determine said motion and the case. The motion to suspend was taken up for hearing by Judge Glaspell pursuant to said request. The counsel for defendant Moody appeared specially, and moved to dismiss the motion for suspension upon the ground that the court was without jurisdiction of the action, the subject-matter, or the person of the defendant; that the application to suspend was unwarranted by any provision of law. They moved to dismiss the action upon the same grounds. The two motions were heard together, whereupon the court sustained the motion of defendant's counsel, and denied plaintiff's motion to suspend defendant, without considering the affidavits or evidence offered by relator, or considering the merits of said motion or the case, and granted defendant's motion to dismiss said action. An order was made and filed by the court reciting that: "The court having heard the arguments of counsel for the respective parties, and being duly advised in the premises, having granted said motion of the defendants to dismiss said action and motion: Now, therefore, it is hereby ordered that said action be, and the same is hereby, dismissed, and that judgment be entered dismissing the same, with costs to defendant." Judgment of dismissal was accordingly entered. An alternative writ of mandamus was thereupon sued out of this court directed to the district court of the Fourth Judicial District, W. S. Lauder, judge of the Fourth Judicial District, and S. L.

Glaspell, judge of the Fifth Judicial District, commanding them, or one of them, to proceed forthwith to hear and determine, on the merits, the application for suspension in the writ described, or to show cause before this court, at the time and place named therein, why a mandatory writ should not issue. On the return day of the writ the respondents answered separately, after first making objections to the jurisdiction of this court and filing demurrers to the alternative writ. No issue of fact is raised by the answers, and all points raised can be disposed of together.

From the return to the alternative writ it appears that Judge Glaspell considered, and so decided, that section 363, Rev. Codes—the only statute under which any pretense of authority can be found to suspend a county officer pending an action for his removal—has no application to a proceeding under chapter 24 of the Code of Civil Procedure, upon which the complaint in the action was founded; also that the complaint was insufficient to entitle plaintiff to proceed under chapter 24, Code Civ. Proc., for the removal of the defendant Moody from the office in which he is installed; that the court was without jurisdiction to try defendant for the purpose of removing him from office in proceedings under said chapter. Relator claims that the court was mistaken in holding that it was without jurisdiction to try a county officer for his removal from office in this form of action and to suspend him; that mandamus is the proper remedy to coerce the trial court into taking and exercising the jurisdiction which it in fact possesses, and to hear the case, and render some decision therein upon the merits. It is conceded that in a proper case mandamus may issue to compel a court to proceed and try a cause when it refuses to do so upon the erroneous decision that it has no jurisdiction. Merrill on Mandamus, section 203; 19 Am. & Enc. L. 827, and cases in note. This remedy is not available, however, where there is another plain, speedy, and adequate remedy in the ordinary course of law to accomplish the same purpose. Section 6111, Rev. Codes 1899; *Cattermole v. Circuit Judge* (Mich.) 99 N. W. 1. Neither will it lie for the purpose of controlling an inferior court in the exercise of its judicial judgment or discretion. *People v. Garnett*, 130 Ill. 340, 23 N. E. 331. The district court did not refuse to exercise the jurisdiction it possessed in this case. On the contrary, it considered and passed upon the right of relator to maintain the action to remove a public officer in the form of action and under the statute upon which he relied, and determined that no

such action would lie. In making this determination the court was acting within the scope of its jurisdiction, and determined a question properly before it for adjudication, and necessarily preliminary to a hearing of the motion to suspend. If the court decided erroneously, this was an error in the exercise of its jurisdiction, to be corrected on appeal. It cannot be compelled to reverse the decision on mandamus. *People v. Garnett*, 130 Ill. 340, 23 N. E. 331; *People v. Dutchess Common Pleas*, 20 Wend. 658; *People v. Weston*, 28 Cal. 640; *Ex parte Ry. Co.*, 103 U. S. 794, 26 L. Ed. 461; *Ex parte Hurn*, 13 L. R. A. 120, and note; *State v. Court* 38 N. J. Law, 182; *State v. Court (Mont.)* 64 Pac. 352; *Ex parte Brown*, 116 U. S. 401, 6 Sup. Ct. 387, 29 L. Ed. 676; 19 Am. & Eng. Enc. L. 829. The distinction between a case where the lower court has refused to take jurisdiction, when, by law, it ought to do so, and one where it refuses to proceed in the exercise of jurisdiction it has obtained, is illustrated in *Ex parte Parker*, 131 U. S. 221, 9 Sup. Ct. 708, 33 L. Ed. 123. Referring to the case of *Ex parte Brown*, 116 U. S. 401, 6 Sup. Ct. 387, 29 L. Ed. 676, the court said: "The Supreme Court of the territory entertained jurisdiction of the cause which was brought before it by appeal, but dismissed it for want of due prosecution—that is to say, because errors had not been assigned in accordance with rules of practice applicable to the form of the action; and we held that the judgment could only be reviewed here on writ of error or appeal, as the case might be. In the case before us the Supreme Court of the territory dismissed the appeal because not properly taken; that is, because the cause had not been brought before it from the lower court. The distinction in the two cases is obvious. In the one the court below had taken jurisdiction and acted, but in the present case it refused to take jurisdiction." In *Ex parte Pennsylvania Co.*, 137 U. S. 451, 11 Sup. Ct. 141, 34 L. Ed. 738, it is decided that, after a case has proceeded to the filing of a declaration and a plea to the jurisdiction, or its equivalent, and a judgment is rendered in favor of the plea, and a consequent dismissal of the action, the plaintiff is confined to his remedy by writ of error, and cannot have a mandamus. In *Shine v. Ry. Co.*, 85 Ky. 177, 3 S. W. 18—an action under the statute for condemnation of land—the county court refused to impanel a jury to try the issue as to value, but, on objection of the defendant to the court's jurisdiction, dismissed the case. Mandamus was applied for to compel the county judge to impanel a jury and

try the case. The court, in denying the writ, said: "Unquestionably, the action of the county court was judicial. It did not refuse to act. It did act, as shown by the copy of its orders filed with the petition, and dismissed the proceeding upon the ground that the appellee could not maintain it owing to the appointment of the receiver. It is unnecessary to decide whether the ruling was correct or not. The right of the appellee to maintain the proceeding was a question presented to the county court by the record for its decision. It exercised its judgment, and dismissed it because it was of the opinion that the appellee had no such power. It reached this conclusion in the exercise of its discretion, and, while mandamus will lie to set a court in motion, it cannot be used to control the result. It may compel the trial of an issue, but not how it shall be tried."

The dismissal of the relator's case did not deprive him of adequate remedy through which he may obtain the trial of the issues which he attempted to have litigated in that case. The object he sought to attain was the removal from office of the sheriff of Richland county for acts of misconduct in office. The acts complained of as grounds for removal can be made available for the same purpose in a different form of proceeding under section 7838, Rev. Codes 1899. This remedy is equally efficacious and speedy with that attempted by relator, and, being so, would bar the remedy by mandamus even if the court was in error in holding that it was without jurisdiction to try the action in the form it was brought. *Territory v. Cavanaugh*, 3 Dak. 325, 19 N. W. 413; *State v. Osborn* (Neb.) 83 N. W. 357; *State v. Meiley*, 22 Ohio St. 534; *Goodwin v. Glazer*, 10 Cal. 333; *Railway Co. v. State*, 25 Ind. 177, 87 Am. Dec. 358; *People ex rel O'Brien v. Adams* (Cal.) 22 Pac. 826. The judgment dismissing the first action, not being upon the merits, would not bar a proceeding against the sheriff under section 7834, Rev. Codes 1899. *Roberts v. Hamilton*, 56 Iowa, 683, 10 N. W. 236; *White v. Savery*, 50 Iowa, 515; *Laird v. Morris* (Nev.) 42 Pac. 11; *Rosenthal v. McMann* (Cal.) 29 Pac. 121. But it is urged that the other remedy is not adequate, in that it cannot be made available to afford relief upon the very subject-matter of the application; that plaintiff claims the right in a civil action to produce proof to the end that the sheriff may be suspended; that the court refused to hear such proofs upon the mistaken idea that it was without jurisdiction so to do, not only because the action in which the motion was made was improperly brought, but because the statute (section 363), which

alone gives authority to suspend in any case, is a dead letter; consequently, should an action be commenced under section 7838, Rev. Codes 1899, for the removal of Sheriff Moody, the relief sought through this mandamus proceeding, to wit, an immediate hearing upon motion to suspend, could not be secured, and the accused would continue to exercise the functions of his office until the termination of the main case. It does not appear from the return that the court held section 363 a dead letter.

The point was urged by counsel upon argument in this court that there is no authority to suspend an officer pending his trial for removal, and *Wishek v. Becker*, 10 N. D. 63, 84 N. W. 590, was cited as necessarily settling this point. We do not think this question is before us for determination. If the remedy mentioned in section 363, Rev. Codes 1899, exists, and may be resorted to, either in an action under chapter 24, Code Civ. Proc., or a proceeding under section 7838, Rev. Codes 1899, the fact remains that it can only be resorted to in a pending action. The action in which relator sought to make his motion has been terminated by the entry of a judgment of dismissal. This ended the action and all jurisdiction of the court over the defendant. The defendant stands, as to that action, as if it had never been begun. *Morgan v. Campbell*, 54 Ill. App. 244; *Loeb v. Willis*, 100 N. Y. 231, 3 N. E. 177; *Brooks v. Cutler*, 18 Iowa, 433. The case cannot be reviewed or reinstated by mandamus. Moody, the defendant in that case, was not served with the petition and alternative writ in this proceeding. He is not before this court. His rights cannot be affected, and a judgment in his favor set aside, in a proceeding to which he is not a party, of which he has had no notice, and no opportunity to be heard.

The alternative writ of mandamus is quashed, and the proceeding dismissed. All concur.

(100 N. W. 248.)

P. H. WEST v. THE NORTHERN PACIFIC RAILWAY COMPANY.

Opinion filed June 14, 1904.

Failure of Duty on Part of a Railway Company Does Not Excuse the Plaintiff's Negligence.

1. Failure to give the statutory signals, and running the train at too rapid a rate of speed, does not excuse negligence on the part of one in charge of a team killed at a railroad crossing.

Railroad Crossing — Contributory Negligence.

2. Plaintiff's servant approached a railroad crossing with which he was familiar, with his horses on a trot, knowing that a train was approaching at a high rate of speed and very near to the crossing, and that a view of the train was obstructed by buildings and cars from a point 127 feet back from the track until he arrived within eight feet thereof. But for the noise of his wagon, he could have heard the train in time to have avoided a collision with it. Under these circumstances he was guilty of negligence, preventing a recovery, first, for attempting to drive in front of a rapidly moving train in close proximity to the crossing, whereby his team was struck and killed by the cars; and, second, for not stopping and thus quieting the noise of his own vehicle, and thereby enabling himself to hear the train before getting upon the track in front of it.

Appeal from District Court, Eddy county; *Glaspell, J.*

Action by P. H. West against the Northern Pacific Railway Company. Judgment for plaintiff. Defendant brings error.

Reversed.

C. J. Maddux, M. Conklin, and Ball, Watson & Maclay, for appellant.

Where the driver of mature years, accustomed to driving horses who had lived and worked near the crossing where the accident occurred, and was familiar with it for a period of six months prior to such accident; had actual notice of the approaching train, saw it coming, estimated its distance and the time it would require him to pass over the crossing as compared with the time which he thought it would take the train to do so; went into the house after he saw it coming and thought he had ample time to get over the crossing before it arrived; and who knew his view was obstructed by buildings and other structures, but nevertheless drove his team in a trot until his horses were on the main line of the road, and looked and listened for the train, knew it had not yet passed over the crossing, and if not visible must be very close; and who did not stop the team anywhere to look or listen but trotted clear down and upon the track, and who would have heard the train but for the unusual noise made by his lumber wagon, and whose horses were quiet and tractable, and at all times under his control; and who was depending upon the sound of the whistle or ringing of the bell, to warn him of the train's near approach, and his attention not being distracted by any other occurrence, in the face of all this to say the plaintiff is

entitled to recover, is to fly in the face of reason and disregard all well settled principles of law.

The defendant, as a matter of law, was guilty of no negligence. If a traveler upon a highway has notice of the train's approach otherwise than by ringing of the bell or the sounding of the whistle, in season to avoid a collision upon the crossing, the object of the whistle, and bell has been subserved, and failure to sound them is not the cause of the traveler's injury. *Railroad v. Bell*, 70 Ills. 102; *McManamee v. Railway*, 37 S. W. 119; *McDonald, v. Railroad*, 22 S. W. 942; *Baker v. Receivers, etc.*, 30 N. J. E. 240; *Chicago, Rock Island & Pac. Ry. Co., v. Houston* 95 U. S. 702, 24 Sup. Ct. Rep. 542; *Burnet v. Railroad*, 39 Atl. 663; *Helm v. Railroad*, 33 S. W. 396.

Nor, in view of the driver's knowledge of the team's approach, was its unusual speed a matter of negligence. *Korrady v. Lake Shore & M. S. Ry. Co.* 29 N. E. 1069; *Pepper v. Southern Pac. Ry. Co.* 38 Pac. 974; *Kelly v. Railroad*, 75 Mo. 138; *Taylor v. Railroad*, 86 Mo. 457; *Pyle v. Clark*, 79 Fed. 744; *State v. Maine Cent. R. Co.* 1 Atl. 673; *Chicago, R. I. & P. R. Co. v. Crisman*, 34 Pac. 286.

It was the duty of the driver, who knew that the train was approaching and had not yet passed the crossing, to stop and listen, or if not to stop, at least to bring his horses to a walk before entering upon the track. It was negligence to drive them upon a trot to a point where, upon seeing the train, he could not possibly avoid a collision. *Elliot on Railroads*, section 1167; *Houghton v. Chicago & G. T. Ry. Co.*, 58 N. W. 314; *Brady v. Toledo, Ann Arbor & N. M. R. Co.*, 45 N. W. 1110; *Shatto v. Railroad*, 121, Fed. 678.

The presence of buildings and structures intercepting the driver's view, when coupled with his knowledge of the approaching train, rendered it imperative that he stop and listen before going upon the track. The greater the danger the greater the precaution required. *Seefeld v. Chicago, M. & St. P. Ry. Co.*, 35 N. W. 278; *Brady v. Toledo, Ann Arbor & N. M. R. Co.* supra; *Barnhill v. Railway*, 33 So. 63; *Day v. Railroad*, 52 Atl. 771; *Railway v. Holden*, 49 Atl. 625; *Hook v. Railway*, 63 S. W. 360; *Chase v. Maine Cent. R. R.*, 45 N. E. 911; *Carter v. Railway*, 47 Atl. 797.

Travelers are bound to make vigilant use of both senses of sight and hearing; and when the driver's failure to hear an approaching train was due to the unusual noise of his own vehicle, he thereby directly contributed to his injury. *Carter v. Railway*, 47 Atl. 797;

Chase v. Maine Cent. R. Co., 5 Atl. 771; Allen v. Maine Cent. R. Co., 19 Atl. 105.

P. M. Matson, and S. E. Ellsworth, for respondents.

A motion for judgment notwithstanding the verdict must be made before judgment is entered on the verdict. *Scheible v. Hart*, 12 S. W. 628; 11 Enc. of Pl. & Pr. 920.

Appellant did not move the District Court, at the close of the testimony, to direct a verdict in its favor. Such motion at such time is a necessary preliminary to a motion for judgment notwithstanding the verdict. *Session Laws 1901, Chap. 63, page 74; Hemstad v. Hall*, 66 N. W. 366; *Sayer v. Harris Produce Co.*, 87 N. W. 617; *Johns v. Ruff*, 12 N. D. 74, 95 N. W. 440.

When a motion for a new trial is addressed to the sound judicial discretion of the trial court and an order made thereon based upon such ground will not be reversed by the Appellate Court, unless the record discloses a case of abuse of discretion. *Gull River Lumber Co. v. Osborne-McMillan Elevator Co.*, 6 N. D. 276, 69 N. W. 691; *Pengilly v. J. I. Case Thresher Co.*, 11 N. D. 249, 91 N. W. 63; *O'Connor v. Clark*, 44 Pac. 482; 14 Enc. of Pl. & Pr. 982 and cases under note 2.

A verdict can only be directed when the undisputed evidence, giving the construction most favorable to the party directed against that it will bear, and after allowing him the benefit of all reasonable inferences arising in his favor, will not sustain a verdict in his favor. *Pirie, Carson et al. v. Gillett*, 2 N. D. 255, 50 N. W. 710.

It was the duty of the court to submit the case to a jury, unless upon the trial the evidence of respondent's contributory negligence was so clear and convincing that all reasonable minds could draw but one conclusion therefrom. *Struck v. Chicago, M. & St. P. Ry. Co.*, 59 N. W. 1022; *Bronson v. Oakes*, 76 Fed. 734; *N. P. Ry. Co., v. Austin*, 64 Fed. 211; *Chicago, etc. Ry. Co., v. Netolicky*, 67 Fed. 665.

Respondent was warranted in assuming that the signals and warning required by law would be given. *Vandewater v. N. Y. etc. R. Co.*, 26 N. Y. S. 397; 8 Am. & Eng. Enc. of Law (2d Ed.) 407.

In view of the obstructed condition of the crossing, respondent might assume that greater care than ordinary in approaching would be observed, and trains would not be run at a high and unusual

rate of speed. *Beanstrom v. Northern Pacific R. Co.*, 48 N. W. 778; *Thomas v. Delaware, etc. Ry. Co.*, 8 Fed. 729.

Where the use of either the sense of sight or hearing would be unavailing, even its non-use may be excused. *Terre Haute & I. R. Co., v. Voelker*, 22 N. E. 20.

The rule that a traveler before going upon a railroad track must look and listen, and that failure to do so is negligence per se, has been refused recognition by the Federal Courts and by the courts of almost all the states. *St. Louis & Ry. Co. v. Barker*, 77 Fed. 810; *Peck v. Oregon Short Line Ry. Co.*, 69 Pac. 153; *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. Rep. 679; 7 Am. & Eng. Enc. of Law (2d Ed.) 433.

If a traveler approaching a crossing takes every reasonable precaution a prudent man would observe to avoid injury from passing trains, he has done all that can be required of him, and whether his conduct, under all the circumstances shows ordinary care is generally a question for the jury under proper instructions. *Cobleigh v. Ry. Co.*, 75 Fed. 247; *Beanstrom v. N. P. Ry. Co.*, supra; *St. Louis, etc. Ry. Co. v. Barker*, 77 Fed. 810; *Northern Pacific Ry. Co. v. Austin*, 64 Fed. 211; *Selensky v. Chicago, Great Western*, 94 N. W. 272; 7 Am. & Eng. Enc. of Law (2d Ed.) 434.

The speed of his horses together with other circumstances of his conduct, should be left to the consideration of the jury. *Atchison, Topeka & S. F. R. Co., v. Shaw*, 43 Pac. 1129; *Moore v. Chicago, St. P. & K. C. Ry. Co.*, 71 N. W. 569; *Hicks v. N. Y., N. H. & H. R. Co.*, 41 N. E. 721; *Selensky v. Chicago, Great Western Ry. Co.*, 94 N. W. 272; *Chicago & I. R. Co., v. Lane*, 22 N. E. 513; *Northern Pacific R. Co. v. Austin*, 64 Fed. 211; *Chicago, etc. Ry. Co. v. Netolicky*, 67 Fed. 665.

A prudent man in the exercise of ordinary care may keep moving towards a railroad track with his vehicle making a certain amount of noise. *St. Louis, etc. Ry. Co. v. Barker*, 77 Fed. 810; *Chicago, etc. Ry. Co. v. Netolicky*, 67 Fed. 665; *Beanstrom v. N. P. Ry. Co.*, 48 N. W. 778.

COCHRANE, J. Defendant appeals from an order denying its motion for judgment notwithstanding the verdict, or for a new trial. The plaintiff recovered the value of a team killed at a railroad crossing. The point for consideration is whether or not, under the evidence, plaintiff's driver was guilty of negligence proximately causing the injury, or of contributory negligence as a matter of law.

The accident occurred on Lamborn avenue, in New Rockford, where the appellant's main track crosses such street at right angles. Lamborn avenue runs east and west, the railroad north and south. There is a side track on the west side of, parallel with, and distant eight feet from the main line track. On the west side of this side track, and north of Lamborn avenue are certain elevators and structures extending for several hundred feet along the side track. The east line of such structures is 8 feet from the center of the side track, and 30 feet 8 inches from the center of the main track. These structures varied in height, and, with cars on the side track near the elevators, obstructed the view of the track to the north, on the part of one approaching from the west on Lamborn avenue, until within eight feet of the track. Chicago avenue runs north and south, west of and parallel with the railroad. It is 127 feet from the west side of Chicago avenue to the center of the main line track, and 1,380 from Lamborn avenue north to the water tank.

From the west side of Chicago avenue a train could be seen if north of the water tank.

Frank Haas, the driver of this team, lived in New Rockford, and had been employed as a driver upon a dray for several months prior to the accident. He was familiar with the crossing on Lamborn avenue and the conditions above described. On the evening of the accident, October 8, 1902, between 6 and 6:30 o'clock p. m., but before dark, Haas was in front of plaintiff's house, one block west of the railroad tracks on Lamborn avenue. He saw a train approaching on the main track, about $1\frac{1}{2}$ miles north. He went into the house, stopped there not over a minute, came out to the street, where his team was standing, turned it around, and started east toward the track. He drove the team on a trot clear down and onto the track. When he crossed the west side of Chicago avenue he looked north, but did not see the train. If it had been north of the water tank he could have seen it. He knew when he could not see it that it was very close to the crossing; knew it had not passed the crossing; knew it was approaching; but thought, from where he had first seen the train, he had time to get over the crossing, and so did not slacken the horses' speed at all until they struck the track. As he was driving, he looked and listened for the train. The wagon he was driving was an ordinary lumber wagon. It made some noise. Haas testified: "I could have heard the train if I had not been

making an unusual noise myself." He saw the train when 50 or 60 feet from him, and when his horses were on the track he tried to back them off, but the team was struck by the engine and killed.

The negligence of defendant is alleged to have consisted in its running the train into the town and across this street at a high rate of speed, without sounding the whistle or ringing the bell. There is a conflict in the evidence both as to the speed of the train in approaching the crossing and as to the warnings given. There was evidence in the case that the train approached the crossing at a speed of 30 miles an hour, and that the whistle was not sounded or bell rung within 80 rods of the crossing. For the purposes of this decision, the evidence will be considered in its most favorable aspect toward plaintiff. Haas testified that if the trainmen had rung the bell or blown the whistle within 80 rods of the crossing, or if the bell had been rung continuously within a block of the crossing, or if the train had been going at the rate of speed that trains usually run through the town, he could have avoided the accident; that he was depending upon the sound of the whistle or the bell to warn him of its approach. It is plain that Haas was guilty of gross negligence, and that his negligence was the direct cause of the accident, and that the negligence of the appellant's trainmen in the particulars mentioned could furnish no excuse or justification for the reckless act of Haas in attempting to cross in front of the approaching train. From the time Haas crossed the Chicago avenue until he reached the track he knew all view of the train would be obstructed, and that he could not gauge its exact distance through the sense of sight, but must rely upon the sense of hearing alone. When 127 feet from the crossing, with his mind and attention fixed upon the fact that the train was approaching; with ocular proof that it had traveled from a point $1\frac{1}{2}$ miles north to a point less than 1,380 feet from the crossing since he had first seen it, less than 3 minutes before, and if the rate of speed was maintained it would be on the street ahead of him in less than 1 minute; with knowledge that he could not see the train again until it emerged from behind the buildings and appeared at the crossing toward which both the train and his team were hurrying; that a stop of a minute at most would let it pass; with full knowledge of the danger of attempting to drive across in front of a train approaching at such a rapid speed, and dangerously near—he took no precautions for his safety, but hastened on as if in a race to see which could first pass the point of intersection.

The trains were not accustomed to stop at the crossing. He knew this, because he relied upon the bell or whistle to warn him when the train would get to the crossing. The erections which obstructed his view of the train also prevented the train crew seeing him. It was impossible, and he knew it would be impossible, for the train crew to see him on the crossing in time to stop the train and avoid a collision. As between himself and the train, the train was entitled to precedence and the right of way, because, from the very nature of the business, the character and momentum of a railroad train, and the requirements of public traffic by means thereof, it cannot be expected that it shall stop and give precedence to an approaching wagon to make the crossing first. It is the duty of the wagon to wait for the train. *Continental Improvement Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 405; *Gahagan v. Ry. Co.*, (N. H.) 50 Atl. 146, 55 L. R. A. 434. Haas voluntarily and unnecessarily put himself and team in a place of known danger on the track in front of the train, and by so doing took the risk of accident. The consequent injury was directly attributable to his want of ordinary care, and not to the negligence of the railway company. The object of requiring the whistle to sound or the bell to ring 80 rods before reaching a crossing, and thereafter until the crossing is passed (section 2976, Rev. Codes 1899), is to notify the traveler so that he can look out for his safety, and allow the train to pass the crossing before he exposes himself to danger by a possible collision. *Warner v. Ry. Co.*, 44 N. Y. 470.

When, as in the case at bar, the person in charge of a team had actual knowledge of the train's approach in ample time to have permitted the train to pass, and knew, without sound of bell or whistle, all that he could have known had the alarm been sounded, it cannot be said that the failure to ring the bell or sound the whistle was the cause of the accident. *Burnett v. Ry. Co.* (N. J. Sup.) 39 Atl. 663; *Chicago, etc., Ry. Co. v. Bell*, 70 Ill. 102; *Pakalinsky v. Ry. Co.*, 82 N. Y. 424; *Chicago, etc., Ry. Co. v. Houston*, 95 U. S. 702, 24 L. Ed. 542; *Blake v. Receiver*, 30 N. J. Eq. 243; *Helm v. Ry. Co.* (Ky.) 33 S. W. 396; *Bertelson v. Ry. Co.*, 5 Dak. 313, 40 N. W. 531; *State v. Ry. Co.*, 76 Me. 357, 49 Am. Rep. 622; *McDonald v. Ry. Co.* (Tex. Sup.) 22 S. W. 942, 40 Am. St. Rep. 803; *McManamee v. Ry. Co.* (Mo.) 37 S. W. 119; *Fletcher v. Ry. Co.*, 64 Mo. 484. In *Burnett v. Ry. Co.* (N. J. Sup.) 39 Atl. 663, it is said: "Irrespective of the question of negligence in attempting

to cross a railroad track in front of a train known to be near at hand, the very moment it appears that the person injured had knowledge that the train approaching the crossing, the nonliability of the railroad company for the injury is established. The only ground upon which it can be held responsible is that it failed in the discharge of the duty which it owed to the person injured, namely, the giving him timely warning of the approach of its train, and that, by its failure, it caused the accident which produced the injury. But if the injured person discovers for himself what the railroad company should have informed him of—that its train was approaching the crossing—it is quite clear that the negligence of the company in failing to warn him had no part in the bringing about of the accident.” In *Chicago, etc., Ry. Co. v. Houston*, 95 U. S. 702, 24 L. Ed. 543, it is said: “The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company’s employes in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the company. No railroad company can be held liable for a failure of experiments of that kind. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure.”

It is urged that respondent had a right to depend upon the trainmen performing their statutory duty, and that, if the bell had rung or whistle sounded continuously as the train approached the crossing, he could have measured its exact location by the sound, and so stopped before getting onto the track; that it was properly a question for the jury whether he was in the exercise of ordinary care under the circumstances. He had actual knowledge, when he crossed Chicago avenue, that the train was within less than 80 rods of the crossing, and that it had not sounded the whistle or bell,

and, as he covering the intervening 127 feet, he had every reason to believe the train was moving at ten times the speed of his team and every second drawing nearer the point of danger, that it was not sounding the bell or whistle, and that he could not, therefore, rely upon these warnings. The ordinary precaution required of one approaching a railroad crossing, when he has no knowledge of the close proximity of the train, is that he look and listen and make a diligent use of all his faculties to inform himself and avoid collision. Where a view of the track in either direction is obstructed before reaching the point of danger, extra precaution is required to ascertain danger through the sense of hearing. When the exercise of these ordinary precautions would have avoided the accident, negligence is conclusively established. Haas' rapid driving and the noise of his wagon prevented his hearing the rumbling of the train—the only means he had of measuring its exact distance. Had he stopped and listened, he would have heard the train. It was his duty to stop and listen, under the circumstances, before venturing onto the track. His failure to do so was negligence as a matter of law. *Haines v. Ry. Co.*, 41 Iowa, 228; *Ry. Co. v. Hunter*, 33 Ind. 364, 5 Am. Rep. 201; *Ernst v. Ry. Co.*, 39 N. Y. 58, 100 Am. Dec. 405; *Baxter v. Ry. Co.*, 41 N. Y. 502; *Salter v. Ry. Co.*, 75 N. Y. 273; *Lake Shore, etc., Ry. Co. v. Miller*, 25 Mich. 274; *Pyle v. Clark*, 79 Fed. 745, 25 C. C. A. 190; *Pakalinsky v. Ry. Co.*, 82 N. Y. 424.

If the failure of the engineer to continuously ring the bell was negligence as to Haas, and in any way contributed to the accident, the case falls within the rule: "Where both parties are guilty of negligence, and the injury is due to the negligence of both, no recovery can be had." *Nashua Iron & Steel Co. v. Ry. Co.*, 62 N. H. 159; *Gahagan v. Ry. Co. (N. H.)* 50 Atl. 146, 55 L. R. A. 434; *Holland v. Ry. Co. (C. C.)* 18 Fed. 243; *Fletcher v. Ry. Co.*, 64 Mo. 484; *Gorton v. Ry. Co.*, 45 N. Y. 662; *Lake Shore, etc., Ry. Co. v. Miller*, 25 Mich. 274. In *Haas v. Ry. Co.*, 47 Mich. 407, 11 N. W. 219; it was said: "To move forward briskly, as the decedent did, from a point whence an approaching train would not be seen, at a time when it was known by him that a train was due, and not to pause until the train was encountered, was so far from being ordinary prudence that it approached more nearly to absolute recklessness." In *Schaefer v. Ry. Co.*, 62 Iowa, 624, 17 N. W. 893, similar to this case upon the facts, the team was trotted onto the track where the accident occurred. It was there

said: "Under the circumstances stated, ordinary care required that the deceased should have stopped and listened at some place before reaching the track. There was nothing to prevent his doing so, and nothing to distract his attention." In *Chicago, etc., Ry. Co. v. Crisman*, 19 Colo. 30, 34 Pac. 286, it is said: "Where one approaching a railroad crossing neglects to avail himself of every opportunity to look and listen, and carelessly ventures upon the track and is injured, such conduct is of itself sufficient to defeat a recovery." In *Merkle v. Ry. Co.*, 49 N. J. Law, 473, 9 Atl. 680, a person drove a wagon loaded with boxes and empty bottles across a railroad track at a point where it was impossible to perceive an approaching train till within six or eight feet of the track. The noise of the bottles prevented his hearing the noise of the train. The court said: "Inasmuch as he could not see an approaching train at any considerable distance from the track, ordinary prudence required him to stop when he was near enough to the railroad to ascertain, at least by listening, whether there was any danger or not." To the same effect is *Keyley v. Ry. Co.* N. J. (Err. & App.) 45 Atl. 811. Judge Thompson, in his work on Negligence, vol. 2, section 1670, says: "As to the duty of one approaching a crossing, if his view alone is obstructed, the exercise of ordinary prudence will plainly require him to stop so that the noise of his vehicle will not prevent him from hearing any train that may be approaching." In the aspect of the evidence most favorable to plaintiff, he should have been nonsuited.

Defendant moved the court for judgment notwithstanding the verdict, or for a new trial. The particular ground upon which it demanded a new trial was the insufficiency of the evidence to sustain the verdict. The motion for judgment notwithstanding the verdict was properly overruled. At the close of the testimony defendant's counsel did not move for a directed verdict. *Ward v. McQueen* (just decided) 100 N. W. 253. Such motion is a necessary preliminary to a motion for judgment notwithstanding the verdict. Chapter 63, p. 74, *Laws 1901*; *Johns v. Ruff*, 12 N. D. 74, 95 N. W. 440. But the motion for new trial was improperly overruled. The verdict is contrary to and is not supported by the evidence.

The order appealed from, in so far as it denied defendant's motion for a new trial, is reversed, and a new trial ordered. All concur.

(100 N. W. 254.)

JOHN D. KENNEDY v. ANTHONY STONEHOUSE.

Opinion filed June 20, 1904.

Action Lies Against an Agent for the Breach of a Contract Made in Bad Faith and Without Authority in the Name of His Principal.

1. Under section 4343, subd. 2, Rev. Codes 1899, one who, without authority, executes a written contract in the name of his principal, without believing in good faith that he has authority to do so, is responsible as principal to third persons for his acts in the course of his assumed agency; and an action is maintainable against him upon the contract, as principal therein, and for its breach.

Agent Is Liable as Principal, and for Costs of Action Against the Latter.

2. Under section 4995, Rev. Codes 1899, one injured by the breach of an agent's warranty of authority may recover damages therefor in "the amount which could have been recovered and collected from his principal if the warranty had been complied with," and, in addition thereto, "the reasonable expenses of legal proceedings taken in good faith to enforce the act of the agent against his principal."

Damages — Statute of Limitations.

3. In 1891 the defendant, as agent for the owner of certain real estate, and in her name, but without authority, and without believing in good faith that he had such authority, executed and delivered to the plaintiff a written contract to sell and convey the same upon the crop-payment plan. The plaintiff entered into possession, completed his payments, and became entitled to a deed in the fall of 1901. In March, 1902, the plaintiff was ejected in an action instituted by the owner. Upon these facts it is *held* (1) that the defendant is liable as principal upon the contract, and for its breach; (2) that plaintiff's cause of action arose when he was ejected by the owner, and is not barred by the statute of limitations; and (3) that a judgment for the value of the land at the date of the breach, and for his costs and expenses in defending the action of ejectment, was proper.

Appeal from District Court, Grand Forks county, *Fisk, J.*

Action by John D. Kennedy against Anthony Stonehouse. Judgment for plaintiff and defendant appeals.

Affirmed.

Tracy R. Bangs, for appellant.

Words of contract against the principal may be disregarded as surplusage, and the action brought against the principal on the con-

tract itself. *Cochran v. Baker*, 56 Pac. 641; *White v. Madison*, 26 N. Y. 117.

A warranty of authority arising by implication does not constitute a "covenant of warranty." 8 Am. & Eng. Enc. Law, 54; 1 Jones on Real Property and Conveyancing, 827, 833 et seq.

If the action is in tort for the deceit practiced on plaintiff by defendant, in assuming to have authority that he did not have, the action is barred by the statute of limitations. Subdiv. 6 of section 5201, Rev. Codes, 1899; 19 Am. & Eng. Enc. Law, 193.

The rule is the same whether the damage results immediately or not. 19 Am. & Eng. Enc. Law, 200; *Wood v. Currey*, 57 Cal. 208; *Lattin v. Gillette*, 30 Pac. 545; *Northrop v. Hill*, 57 N. Y. 351; *Everett v. O'Leary*, 95 N. W. 901.

The statute begins to run without regard to the time that plaintiff was aware of his right of action. 19 Am. & Eng. Enc. Law, 213.

Plaintiff's right of action accrued upon the delivery and execution of the contract to wit: April 20, 1891.

The action is not for relief on the ground of fraud in a case heretofore solely cognizable in chancery; and the running of the statute is not postponed until the facts constituting the fraud are discovered, and therefore not within subdivision 6, section 5201, Rev. Codes, 1899. *Foote v. Farrington*, 41 N. Y. 164; *Jaffray v. Bear*, 9 S. E. 382; *Relf v. Eberly*, 23 Ia. 467; *Carr v. Thompson*, 87 N. Y. 160; *Jacobs v. Fredrick*, 51 N. W. 320; *Clausen v. Meister et al*, 29 Pac. 232; *Miller v. Wood*, 22 N. E. 553.

Plaintiff was informed by one Warren, the agent of the owner of the land, in 1893, that defendant had no authority to sell plaintiff the land, and demanded possession, which the plaintiff refused until he was paid for his improvements. Plaintiff claims that he was guaranteed his deed by defendant when the delivery of the wheat was complied with under the contract, but this does not exempt him from prosecuting his inquiries upon the information from Warren. If a party would avoid the bar of the statute, on account of fraud, he must show due diligence to detect it, and will be deemed to have known it, if the means of discovery were within his power. *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807; *Norris v. Haggin*, 28 Fed. 275; *Peall v. Slaven*, 40 Fed. 774; *Murray v. Chicago & N. W. Ry. Co.*, 92 Fed. 868; 19 Am. & Eng. Enc. Law, 250.

Fraudulent concealment does not postpone the running of the statute of limitations. There is no statute making such conceal-

ment postpone the running of the statute of limitations. Without statutory authority the courts can create no such exception. *Jaffary v. Bear*, 9 S. E. 382; *Lenhardt v. French*, 35 S. E. 761; *Fee's Adm'r v. Fee* 10 Ohio, 470; *Jacobs v. Frederick*, 51 N. W. 320; *Murray v. Chicago & N. W. Ry. Co.*, 92 Fed. 868; *Amy v. City of Watertown*, 130 U. S. 320, 9 Sup. Ct. Rep. 537; *Pollock et al. v. Wright et al.*, 87 N. W. 584.

A contract of warranty of authority is analogous to a covenant of seizin, and the latter is broken upon the execution and delivery of the deed, if the grantor has no title. *Mitchell v. Kepler*, 39 N. W. 241; *Sherwood v. Landon et al.*, 23 N. W. 778; *Union Pac. Ry. Co. v. Barnes*, 64 Fed. 80.

The implied warranty of title to personal property is broken immediately if vendor has no title. *Chancellor v. Wiggins*, 39 Am. Dec. 499. And so the warranty implied in the indorsement of a note, if it is forged. *Ware v. McCormack*, 28 S. W. 157, 959; *Blethen v. Lovering*, 58 Me. 437; *Graham v. Robertson*, 3 S. E. 611; *Jefferson Co. v. Burlington & M. R. R. Co.* 23 N. W. 899; *Marton v. City of Nevada*, 41 Fed. 582; *Bartlett v. Bulleve*, 23 Kan. 606; *Northrop v. Hill*, 57 N. Y. 351; *Russell & Co. v. Polk County Abstract Co.*, 54 N. W. 212; *Lattin v. Gillette*, 30 Pac. 545; *Miller v. Wood*, 22 N. E. 553.

Where an agent has executed a contract for his principal without authority, the agent is not bound as principal, unless the contract contains apt words to bind him. *White v. Madison*, 26 N. Y. 117; *Dung v. Parker*, 52 N. Y. 494; *Baltzen v. Nicolay*, 53 N. Y. 467; *Johnson v. Smith*, 21 Conn. 627; *Ogden v. Raymond*, 22 Conn. 379; *Taylor v. Shelton*, 30 Conn. 626; *Duncan v. Niles*, 32 Ill. 532; *Wheeler v. Reed*, 36 Ill. 61; *Abbey v. Chase*, 6 Cush. 56; *Bartlett v. Tucker*, 104 Mass. 341, 6 Am. Rep. 240; *Ballou v. Talbot*, 16 Mass. 461, 8 Am. Dec. 146; *Noyes v. Loring*, 55 Me. 411; *Sheffield v. Ladue*, 16 Minn. 388; *Cole v. O'Brien*, 34 Neb. 68, 51 N. W. 316; *Brong et al. v. Spence*, 77 N. W. 54; *Farmers' Co-op. Trust Co. v. Floyd*, 26 N. E. 110; *Cochran v. Baker*, 56 Pac. 641; *Clark v. Foster*, 8 Vt. 98; *McCurdy v. Rogers*, 21 Wis. 199.

In these cases it is held, that aciton is either on an implied warranty of authority, or for deceit, according to the circumstances of each particuler case.

In California, whose statute is like that of North Dakota, it is held, where the contract is in terms the contract of the principal,

the agent cannot be held as principal thereon. *Hall v. Crandall*, 29 Cal. 568; *Lander v. Castro*, 43 Cal. 497; *Wallace v. Bentley et al.*, 77 Cal. 19, 18 Pac. 788; *Senter et al. v. Monroe*, 77 Cal. 347, 19 Pac. 580. See also *Clark v. Foster*, 8 Vt. 98.

The fact that section 4995 lays down a rule of damages for a breach of an agent's warranty of authority, does not preclude the adoption of another. *Browne v. Wolcott*, 1 N. D. 415, 48 N. W. 336.

We believe the rule applicable to this case is found in section 4978. The contract which the agent made was without authority and invalid. The wrong was immediate, and the plaintiff had a right of action for damages. If the land had been worth more than the plaintiff agreed to pay he was entitled to the difference. *Skaaraas v. Finnegan*, 16 N. W. 456.

If the rule of this case is the correct one, the plaintiff's action is not only barred, but he has failed to prove the value of the real estate at the date of the contract.

Standish & Barry, for respondents.

One who assumes to contract for another to sell land to a third party, is supposed to know whether he has authority so to deal, and how he obtained it; and when he acts without such authority the law presumes his intent and purpose fraudulent, and shifts to him the burden to show that he acted in good faith under the belief that he had authority. *Clark v. Lewis*, 8 Vt. 96; *Wear v. Gove*, 44 N. H. 196; *Farmers' Co-op. Trust Co. v. Floyd*, 26 N. E. 110.

The defendant by signing the contract represented that he had authority to sign it, and so warranted, and this became an implied warranty and a part of the contract. He assumed, himself, the fulfilment of the contract as fully as his principal could have done. Section 4343, Rev. Codes 1899.

The liability for falsely assuming to act as agent does not arise, until some suit against, or by, the principal determines that he had no such authority. Section 4995, Rev. Codes, 1899, assumes this when it provides that the cost of such suit is to become a portion of the damages recoverable against the agent.

As between grantor and grantee, where grantee is put in possession until the time arrives for a deed, the statute of limitations is suspended. *Love v. Watkins*, 40 Cal. 547 (565). Where a grantee goes into possession and gets no title to the land, as long as his possession is not disturbed, before he can sue on the covenants, he

must either surrender possession and sue, or wait until he is ejected. *Montgomery v. N. P. R. R. Co.* 67 Fed. 445; *Burr v. Greeley*, 52 Fed. 926; *Fowler v. Smith*, 2 Cal. 568; *Norton v. Jackson*, 5 Cal. 263; *Clements v. Collins*, 59 Ga. 124; *Fowler v. Chiles*, 27 Kan. 504; *Hopkins v. VanWickle*, 2 La. Ann. 143; *Waugh v. Good*, 6 Mo. App. 600; *Holladay v. Menifee*, 30 Mo. App. 207; *Pence v. Gabbert*, 63 Mo. App. 302; *Roomis v. Bedel*, 11 N. H. 74; *Griffith v. Hemshall*, 1 Clarke Ch. 571; *Blydenburgh v. Cathcal*, (1 Duer 176); *Lewis v. Cook*, 35 N. C. 193; *Talbot v. Bedsford's Heirs*, 3 Tenn. 442; *Scott v. Kirkendall*, 88 Ill. 465; *Wilson v. Irish*, 17 N. W. 511; *Allis v. Nininger*, 25 Minn. 535; *Jones v. Richmond*, 13 S. E. 414.

Statutes are interpreted with reference to the common law. *Sutherland on Stat. Const.*, section 29.

The only damage that could be fixed would have to calculate the value of the land, when the deed was earned, and an action in deceit would not lie so long as plaintiff was in possession; and there was no time for a suit until ejectment and an action on the principalship of the agent was the only remedy. 8 Am. & Eng. Enc. Law, (2d Ed.) 110.

As to necessity of surrender of purchase, see 8 Am. & Eng. Enc. Law, (2d Ed.) 111. Sufficiency of hostile assertion, see 8 Am. & Eng. Enc. Law, 113. Burden of proving title paramount, see same, page 198.

This action is properly brought. It is upon the warranty and principalship liability of the agent contained in the contract, and the complaint is in proper form. *Cochran v. Baker*, 56 Pac. 641; *Farmers' Cooperative Trust Co. v. Floyd*, 26 N. E. 110.

The measure of damages is the value of the land in the fall of 1901, the time when the conveyance should have been made. *Pinkston v. Huie*, 9 Ala. 252; *Gibbs v. Jemison*, 12 Ala. 820; *Wells v. Abernethy*, 5 Conn. 222; *Buchmaster v. Grundy*, 1 Scam. (Ill.) 310; *McKee v. Brandon*, 2 Scam. (Ill.) 339; *Plummer v. Rigdon*, 78 Ill. 222; *Hill v. Hobart*, 16 Me. 484; *Lawrence v. Chase*, 54 Me. 196; *Dyer v. Dorsey*, 1 Gill & J. 440; *Cannel v. McAhean*, 6 Har. & J. 297; *Kirkpatrick v. Downing*, 58 Mo. 32; *Drake v. Baker*, 34 N. J. L. 358; *Barbour v. Nichols*, 3 R. I. 187; *Bordman v. Keeler*, 21 Vt. 84; *Hopkins v. Lee*, 19 U. S. 109, 5 L. Ed. 218.

A party by his own fraud may be estopped from pleading the statutes of limitation where he has done an act that prevented suit being brought while the statute was running. 13 Am. & Eng. Enc.

Law (1st Ed.) 719; *Armstrong v. Levan*, 109 Pa. St. 177; *Lingar v. Hazelwood*, 11 Lea (Tenn.) 539; *Simplot v. Chicago, etc., Car Co.* 16 Fed. 350; *Bailey v. Glover*, 88 U. S. 342, 22 L. Ed. 636; *Prondzinski v. Garbut*, 8 N. D. 191, 77 N. W. 1012; *Cox v. Huntsville Gas Light Co.*, 106 Ala. 373, 17 So. 626; *Board of County Commissioners v. State*, 7 N. E. 254; *Davis v. Hoopes*, 33 Miss. 175; *Union Mortgage Banking & Trust Co. v. Peters*, 18 So. 496; *Talmadge v. Renselaer and S. R. Co.* 13 Barb. 493; *Ransom v. Shuler*, 43 N. C. 304; *Chase v. Carney*, 31 S. W. 43; *Wilson v. McElroy*, 50 N. W. 55; *Tucker v. Bentley*, 2 S. W. 769.

Ordinary prudence and diligence do not require a person to test the truth of representations made to him by one as to his own knowledge, with the intention that they should be acted upon. *Fargo Gas & Coke Co. v. Fargo Gas & Electric Co.*, 4 N. D. 219, 59 N. W. 1066. Section 5713, Rev. Codes, 1899.

YOUNG, C. J. The plaintiff sues to recover damages for the breach of a written contract to sell and convey 160 acres of land situated in Grand Forks county. The contract in question was executed by the defendant as agent of the owner, and in her name, but wholly without her authority. The trial was to the court without a jury. Plaintiff was awarded damages in the sum of \$3,142.29. The defendant has appealed from the judgment, and demands a review of the entire case in this court.

The defendant admits that he had no authority from the owner to execute the contract in question, and "that at some time he was liable to the plaintiff for this assumption of authority," but claims that whatever cause of action arose in plaintiff's favor for the injury sustained by reason of his assumption of authority is barred by the statute of limitations. The applicability, as well as the sufficiency, of this defense depends entirely upon the character of the defendant's liability and the nature of the plaintiff's cause of action. The questions of fact which are in issue are fully covered by the findings of fact, and the latter are, in our opinion, amply sustained by the evidence. So far as material to a consideration of the questions of law involved, they may be stated as follows: On April 20, 1891, and until the 4th day of March, 1902, one Eugenia A. Tinker, a resident of the state of Connecticut, was the owner of the land in question. On the first-named date, to wit, April 20, 1901, the defendant, Anthony Stonehouse, a resident of Larimore, in the county of Grand Forks, executed and delivered to the plaintiff

a written contract for the sale of said land, in which Eugenia A. Tinker was named as party of the first part, whereby, in consideration of the plaintiff's agreement to deliver to her or her agent 1,900 bushels of wheat at one of the elevators at Niagara, in said county, she agreed to sell and convey said land by a deed of warranty to this plaintiff. By the terms of the contract, payment was to be made by delivering one-half of the wheat grown each year until the entire amount was delivered. The contract was signed by the plaintiff, and the defendant signed the same for his alleged principal in the following form: "Eugenia A. Tinker, per Anthony Stonehouse, Agent." The plaintiff immediately entered into possession under said contract, and in all things fully complied with its terms, delivering the half of the crop each year to the defendant, as agent for the owner, until the fall of 1901, when the delivery was completed, and plaintiff was entitled to a deed. The trial court expressly found that the defendant, "in signing the said contract and doing the acts aforesaid, assumed to act as an agent for the said Eugenia A. Tinker without authority therefor, * * * and, at the time he so signed the same, well knew that he had no authority to sign the same, and, further, that at the time he so signed the said contract he did not believe, in good faith, that he had authority to sign the said contract, and attach thereto the name of Eugenia A. Tinker, by himself as agent, and that defendant did not disclose to plaintiff until July 1, 1901, that the defendant had signed said contract without authority, and that up to the last-named date, at divers times from year to year, said defendant continued to and did represent to and assure plaintiff that he was and had been authorized by the said Eugenia A. Tinker to make the signature aforesaid to the said contract, and to further represent to and assure plaintiff during all that period that, if said plaintiff would remain in possession of said land and comply with the conditions of said contract, he, said defendant, Stonehouse, would see that plaintiff would receive a deed under the contract, and up to July 1, 1901, plaintiff did not know that these assurances and representations of defendant were untrue, nor did plaintiff know that said defendant had signed said contract without authority, and plaintiff believed in said assurances of said defendant at all times, and, on the faith of them, continued to remain in possession of said lands, and go on complying with the terms of said contract, and completing payments thereon, to secure a deed of the said lands, until the fall of 1901." In July, 1901, Eugenia A. Tinker instituted

an action against this plaintiff for the possession of the land upon the ground that Stonehouse had no authority to make the contract in question, and that she had not ratified the same. The defendant, Stonehouse, pursuant to notice from plaintiff, assisted in the defense of that action. Judgment was entered therein on March 4, 1902, requiring the plaintiff to surrender possession to Eugenia A. Tinker. Upon these facts the learned trial judge held that the defendant was liable to the plaintiff upon the contract and for its breach to the same extent that the owner would have been, had she been bound by it; that is, for the value of the land at the time plaintiff was ejected, and, in addition, for the costs which plaintiff incurred in defending the Tinker suit, including a reasonable attorney's fee. We are entirely satisfied with the correctness of this conclusion.

There has been much diversity of judicial opinion as to the character of the liability of one who, without authority, executes a contract in the name of an alleged principal. Three forms of remedy have been recognized by the courts as available to the other party to the contract, each being based upon a distinction in the nature of the liability: (1) An action against the agent upon the contract, as principal in the contract; (2) an action against the agent for damages for the breach of his warranty of authority to execute the contract; and (3) an action for deceit, where the agent has acted in bad faith in his assumption of authority. As we have seen, the trial court placed its judgment upon the first ground. It is conceded that the complaint is broad enough in its allegations to authorize a recovery upon any one of the three grounds, if they are available; and it will be conceded that, if the present action is maintainable upon the first ground (that is, upon the contract against the defendant as principal therein), the statute of limitations is not applicable, for there was no breach of the contract until the owner of the land, the alleged principal in the contract, refused to execute the deed, when, according to the terms of the contract, it was due, in the fall of 1901. In that event the judgment is not assailable. Counsel for defendant contends (1) that, under the great weight of modern authority, the remedy by an action upon the contract is no longer available; and (2) that the party injured is limited to one of the other two remedies—that is, to an action for damages for the breach of warranty of authority, or to an action for deceit—and that as to either the cause of action arose when the defendant signed

and delivered the contract without authority on April 20, 1891, and is therefore barred by the statute of limitations.

Inasmuch as we are agreed that the statutes to which we shall hereafter refer establish the plaintiff's right to recover upon the contract, and sustain the conclusions of the trial court, it will not be necessary to consider whether he also had, as concurrent remedies, the right to sue for breach of warranty of authority or for deceit, and, if he had when his cause of action therefor arose. The earlier cases in this country, especially those in New York, laid down the rule that one who enters into a contract in the name of an alleged principal, but without authority, is liable to third persons upon the contract as principal, and for the reason that it must have been the intention of the parties to bind some one, and, as the principal is not bound, the agent should be. *Feeter v. Heath*, 11 Wend. 477; *Meech v. Smith*, 7 Wend. 315; *Dusenbery v. Ellis*, 3 Johns. Cas. 70, 2 Am. Dec. 144; *Rossiter v. Rossiter*, 8 Wend. 494, 24 Am. Dec. 62; *Palmer v. Stephens*, 1 Denio, 471; *Walker v. N. Y. State Bank*, 9 N. Y. 582. See, also, *White v. Madison*, 26 N. Y. 117; *Mott v. Hicks*, 1 Cow. 513, 536, 13 Am. Dec. 550; *White v. Skinner*, 13 Johns. 307, 7 Am. Dec. 381; *Randall v. Van Vechten*, 19 Johns. 60, 10 Am. Dec. 193; *Underhill v. Gibson*, 2 N. H. 352, 9 Am. Dec. 82; *Grafton Bank v. Flanders*, 4 N. H. 239. The rule of liability thus enunciated in the New York cases first above cited was embodied in the form of a proposed statute by the Field Code Commission of that state, and the same was adopted by the Legislature of Dakota Territory in 1866 as a part of the Civil Code, without change, and has since been, and is now, in force in this jurisdiction. Sections 4342, 4343, Rev. Codes 1899, which establish this doctrine, are identical with those contained in the proposed Field Code, and read as follows:

"Sec. 4342. One who assumes to act as an agent thereby warrants to all who deal with him in that capacity that he has the authority which he assumes.

"Sec. 4343. One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency in any of the following cases, and in no others: * * * (2) When he enters into a written contract in the name of his principal without believing in good faith that he has authority to do so."

That it was the express purpose of section 4343, subd. 2, *supra*, to declare the doctrine announced in the earlier New York cases, is

apparent from the commissioner's note appended to subdivision 2 of this section, as well as from the language of the statute itself. See note 2, section 1256, Field's Civil Code of New York; also notes on the same statute in Dearing & Pomeroy's Civil Code of California, section 2343. It does not admit of doubt that plaintiff has a right of action upon the contract against the defendant as principal therein, for the statute just quoted declares in express language that "one who enters into a written contract in the name of his principal without believing in good faith that he has authority to do so"—and that is this case—"is responsible to third persons as a principal." Few, if any, courts have in recent years, when not controlled by statute, followed this rule. Indeed, it seems to have been utterly repudiated both in England and in this country, including New York, where it had its origin. See 1 Chitty on Cont. (11th Ed.) 314; 1 Parsons on Cont. (9th Ed.) 69; Reinhard on Agency, section 307; Wharton on Agency & Agents, sections 532, 533; Mechem on Agency, section 550, and cases cited—from an examination of which it will appear that the modern doctrine undoubtedly is that where the contract is made in the name of the principal, and as his contract, "the agent cannot be held liable upon it, but only for the deceit or breach of warranty." So far as this case is concerned, it may be conceded that the modern doctrine is the better one and that the earlier one is, as many of the cases state, utterly illogical and absurd. With this question, however, we have no present concern, for the Legislature acting within its authority, has plainly declared the earlier rule to be the law in this jurisdiction. Our duty is restricted to expounding and applying it. We may not repeal it or nullify it by evasive interpretation. Furthermore, the Legislature has prescribed the measure of liability of all agents who act without authority. Section 4995, Rev. Codes 1899, declares that "the detriment caused by the breach of a warranty of an agent's authority is deemed to be the amount which would have been recovered and collected from his principal if the warranty had been complied with and the reasonable expenses of legal proceedings taken in good faith to enforce the act of the agent against his principal." The damages awarded by the trial court in this case are clearly within the measure of liability thus declared.

The defendant claims that as early as September, 1893, the plaintiff had knowledge of his want of authority, and, assuming this to be the fact, contends that he cannot recover for damages which

accrued after that date, and that his cause of action for damages accruing prior thereto is barred by the statute of limitations. There is no merit in this claim. What the plaintiff's right would have been in case he had had such knowledge, we do not determine. The case presents no such condition. True, it appears in evidence that the plaintiff was told by one Warren at that time that the defendant did not have authority to execute the contract. But the evidence also shows that the plaintiff immediately inquired of the defendant as to the fact, and was assured by him in most emphatic terms that he had such authority. The plaintiff relied upon this assurance, continued in possession, and completed his payments. Under these circumstances, the defendant will not now be heard to say that his assurance as to the fact upon which the plaintiff relied was false, and should not have been believed. Under the facts of this case, it is clear that plaintiff's cause of action upon the contract arose when he was ejected by the owner, in 1902. See *Harris v. Harris*, 70 Pa. 170; *Richards v. Elwell*, 48 Pa. 361.

The conclusions of the trial court meet our full approval, and the judgment will be affirmed. All concur.

(100 N. W. 258.)

PETER PICTON V. THE COUNTY OF CASS ET AL.

Opinion filed June 23, 1904.

Legislative Power Not Conferred by Chap. 161, Laws of 1903 — Administration — Discretion.

1. Chapter 161, p. 213, Laws 1903, which provides for the enforcement of payment, by judicial proceedings, of taxes upon real property sold to the state or county, and remaining unredeemed for more than three years, and gives to the several boards of county commissioners of all counties in the state a discretionary authority to institute the proceedings therein provided for, is not vulnerable to the objection that it delegates legislative power to said boards. The act is complete and is in force in every county in the state by legislative will. The discretion committed to the several boards is administrative only.

Act Is Constitutional — General Laws of Uniform Operation.

2. Neither does the above act violate subdivision 23 of section 69 of the state constitution, which prohibits the legislature from passing local or special laws "for the assessment or collection of taxes," or section 11 of the constitution, which requires that "all laws of a

general nature shall have a uniform operation." The remedy afforded by this act is extended to each county in the state, and upon the same terms, and when invoked it is followed by the same consequences. It is therefore uniform in its operation, within the meaning of the above constitutional requirement.

Appeal from District Court, Cass County; *Pollock, J.*

Action by Peter Picton against the County of Cass and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Newman, Spaulding & Stambaugh, for appellant.

The act in question, Chap. 161, Laws of 1903, vests in the board of county commissioners, power to decide upon the expediency and advisability of the collection of the general revenues of the state, and its municipalities within their respective counties. This is delegating legislative power to such board, and the legislature has no power to do this. *Barto v. Himrod*, 8 N. Y. 483; *Ex parte Wall*, 48 Cal. 279; *Bank v. Brown*, 26 N. Y. 467; *Cooley on Taxation*, (6th Ed.) 141; *Santo v. State*, 2 Ia. 165; *State v. Geebrick*, 5 Ia. 491.

Under the constitution no special laws shall be enacted in cases where a general law can be made applicable. *Rice v. Foster*, 4 Harr. 479; *State v. Geebrick*, 5 Ia. 491; *Parker v. Commonwealth*, 6 Pa. St. 50; *People v. Collins*, 3 Mich. 401; *State v. Weir*, 33 Iowa, 134; *State v. Field*, 17 Mo. 529; *Mann v. State*, 4 Ind. 342; *In re Municipal Suffrage to Women*, 36 N. E. 488.

The statute in question further delegates to the boards of county commissioners the power of suspending the operation of section 1271, of Rev. Codes, in their respective counties. If valid, such board surrenders all the county's right and title to the land bought in for taxes, and accepts in lieu thereof, the lien of the taxes as originally assessed, and thereafter has no title that it can convey. *McHenry v. Kidder Co.*, 8 N. D. 413, 79 N. W. 875. Thus rendering inoperative said section 1271, and this the legislature has no power to authorize such boards to do. *State v. Geebrick*, *supra*; *State v. Field*, *supra*; *Slinger v. Henneman*, 38 Wis. 504.

An act must be such, that it not only may, but must, operate uniformly upon all subjects brought within its operation. *Vermont Loan & Trust Co. v. Whithed*, 2 N. D. 82, 49 N. W. 318; *Duluth Banking Co. v. Koon*, 84 N. W. 337; *Ex parte Smith*, 38 Cal. 702; *Brooks v. Hyde*, 37 Cal. 366; *State v. Deets*, 38 Pac. 798.

Emerson H. Smith, for respondents.

The legislature may make such provisions as it sees fit as to the taking effect and operation of laws. They may be absolute, or conditional and contingent. *Smith v. City of Janesville*, 26 Wis. 291; *In re Richard Oliver*, 17 Wis. 681; *State ex rel v. O'Neill*, 24 Wis. 149; *State v. Parker*, 26 Vt. 363.

The act in question simply provides for putting in operation Chap. 161 Laws of 1903. If there is nothing in the act that goes to the "determining power whether such shall be the law or not," the law is constitutional. *People v. Fire Ass'n of Philadelphia*, 92 N. Y. 317; *State v. Parker*, 26 Vt. 363.

The law is general and uniform in its operation and therefore constitutional. *Edmunds v. Herbrandson*, 2 N. D. 270, 50 N. W. 970.

The first law known as the "Wood's Law" was only temporary. A second "Wood's Law," Chap. 161, 1901, was to supplement the first. *Angell v. Cass County*, 11 N. D. 265, 91 N. W. 72.

The legislature likely passed the act of 1903 to afford remedy to counties not having availed themselves of the preceding enactments, which were temporary in their effect. *Emmons County v. First Nat'l Bank*, 9 N. D. 583, 84 N. W. 379; *Cass County v. Security Investment Co.*, 7 N. D. 528, 75 N. W. 775.

YOUNG, C. J. This action was brought by a resident and taxpayer of Cass county against the county commissioners and clerk of the district court of that county to enjoin further proceedings for the collection of real estate taxes under the provisions of chapter 161, p. 213, Laws 1903, which is entitled: "An act to enable boards of county commissioners to institute proceedings to enforce payment of taxes on real property sold to the state or county for taxes, and remaining unredeemed for more than three years." The defendants filed a general demurrer to the complaint. This was sustained, and judgment was entered dismissing the action. The appeal is from the judgment, and error is assigned upon the order sustaining the demurrer. It is agreed that the only question involved is the constitutionality of the above act.

The act in question consists of 40 sections, and, as indicated by its title, its purpose is to confer upon the boards of county commissioners of the several counties of the state the power to institute the proceedings therein provided to enforce the payment of taxes on real

property which has been sold to the state or county for taxes, and has remained unredeemed for more than three years. Section 1 reads as follows: "The board of county commissioners in any county in this state is hereby authorized to cause the proceedings hereinafter provided to be instituted and conducted, whenever in the judgment of the said board it is advisable to do so. Whenever the board of county commissioners desire such proceedings to be instituted, it shall, at some regular meeting, pass a resolution to that effect, and the proceedings hereinafter provided shall be thereupon instituted forthwith." Section 2 requires the county auditor to prepare and file with the clerk of the district court a list, which, among other things, shall include every tract of land which has been sold to the state or county within three years prior to the passage of the resolution referred to in section 1, and upon which taxes have not been paid by redemption or assignment to an actual purchaser, and provides that the filing of such list with the clerk shall have the force and effect of the filing of a complaint in an action by the county against each piece of land described in the list, to enforce the taxes, interest, and penalty therein appearing against it, and shall also operate as a notice of the pendency of the action. Section 3 requires the clerk forthwith to make a copy of the list, and to attach to it a notice substantially in the form therein prescribed. Section 4 requires the auditor to cause the notice and list to be forthwith published for three consecutive weeks in a newspaper of general circulation published in the county. Section 5 gives every person who has an interest in the land 30 days in which to file his answer. Section 6 requires the clerk, upon default of answer, to enter judgment against each tract for the amount of taxes, interest, and penalty appearing from the list to be due thereon, and prescribes the form of the judgment. Section 7 regulates the procedure when an answer is filed. Other and subsequent sections provide for a sale of the lands by the sheriff under the judgment, and for the issuance of certificates to purchasers. It is also provided that after the resolution referred to in section 1 has been passed, and before the list provided for by section 2 has been filed with the clerk, any person may pay his taxes "by paying the amount of the tax for the several years, with interest at the rate of seven per cent per annum from the time when the taxes of each year become delinquent, and without any other interest, penalty or costs; and such payments shall relieve the piece or parcel of land on which the taxes shall be so paid from any

forfeiture to the county whether valid or invalid." Laws of 1903, p. 226, chapter 161, section 32. The lands against which the proceedings authorized by this act are directed are those which have been sold to the county at tax sales under the general revenue laws. The status of such lands, independent of the provisions of the act under consideration, is fixed by section 89, chapter 126, p. 289, Laws 1897 (section 1271, Rev. Codes 1899), which provides that "all parcels of real property bid in for the county under the provisions of this chapter and not redeemed or assigned within three years from the date of the certificate of sale, shall become the absolute property of the county and may be disposed of by the county auditor at public or private sale, as the county commissioners may direct, subject to such rules and restrictions as they may prescribe. * * * Any person having any interest in or lien upon any piece or parcel of forfeited land may redeem the same at any time after forfeiture, and before the sale thereof, by paying the amount due thereon."

The contention of the appellant is that the statute in question is unconstitutional for the alleged reason that "it delegates legislative power to the board of county commissioners, in this: That it authorizes said boards to determine whether or not it is advisable in their respective counties to collect portions of the public revenue, and authorizes such boards, in their discretion, to suspend the operation of section 1271, Rev. Codes, supra, within their respective counties." This contention is based upon section 25 of the state Constitution, which declares that "the legislative power shall be vested in a Senate and House of Representatives." It is well established that the exercise of the power thus intrusted to the Legislature cannot be delegated by that body. We cannot agree, however, to the contention that this act confers, or attempts to confer legislative power upon the several boards of county commissioners. Counsel for appellant assume that section 1 of this act gives to the board of county commissioners the power to decide whether this act shall or shall not be the law in that particular county, and that the very existence of the law itself depends upon the passage of the resolution referred to in that section. If this were true, it might be urged with propriety that the Legislature had not made a complete law, but had merely proposed a law, and intrusted its completion to the discretion of another body, and that the law is in fact made and adopted by the resolutions of the various boards. In that event the doctrine of the following cases, cited by the appellant against the validity of the act, would be in point: *Barto v. Himrod*,

8 N. Y. 483, 59 Am. Dec. 506; *Ex parte Wall*, 48 Cal. 279, 17 Am. Rep. 425; *Bank v. Brown*, 26 N. Y. 467; *Cooley on Taxation* (6th Ed.) p. 141; *Santo v. State*, 2 Iowa, 165, Am. Dec. 487; *Geebrick v. State*, 5 Iowa, 491. There is, however, in our opinion, no warrant for assuming that the board of county commissioners, under this act, shares in the exercise of the law making power. What is the power which is given to them by this act? Is it the discretion to determine whether the act shall be a law? Most certainly not. That discretion—and it is exclusively a legislative discretion—was definitely and finally exercised by the Legislature. The law is complete in every respect, and its existence as a law is not made dependent upon any contingency whatever. The Legislature declared, through an emergency clause, that, “this act shall take effect and be in force immediately after its passage and approval.” What, then, is the discretionary power which is given to the county commissioners? It is clear that it is nothing more than an administrative discretion, in the language of the act, “to cause the proceedings” therein provided for to be instituted and conducted. In other words, the discretionary power which section 1 confers upon the several boards is not the legislative discretion of determining the policy and expediency of the law, and deciding whether or not it shall be the law, for, as we have seen, that discretion was fully exercised by the Legislature, but is an administrative discretion committed to them, as the fiscal agents of the county, to determine whether and when the machinery for the collection of real estate taxes provided by this act shall be set in motion. It confers the power upon all counties of the state alike to invoke the remedies therein provided. They may or may not avail themselves of its provisions, according to their discretion. The fact that it merely authorizes the proceedings, and does not command them to be taken, furnishes no legal objection to the validity of the law. All legislative acts are divided into two classes: First, those which imperatively command or prohibit the performance of acts; and, second, those which only authorize or permit acts to be done. The former may be classed as mandatory, and the latter as permissive. The latter class of laws are set in motion, not by command of the Legislature, but by the exercise of a discretion outside of the Legislature. It is probable that the major part of the acts of the Legislature are permissive, instead of mandatory. The distinction between legislative discretion and administrative discretion will be

more apparent by a liberal reference to a number of adjudged cases. The Supreme Court of Ohio, in *C., W. & Z. Ry. Co. v. Commissioners*, 1 Ohio St. 77, in overruling an objection that an act of the Ohio Legislature which depended for its effect upon a vote of the people in Clinton county involved a delegation of legislative power, said: "The whole body of our legislation, as well as that of every other state, is divided between laws which imperatively command or prohibit the performance of acts, and those which only authorize or permit them;" and, after referring to several classes of permissive laws, the enforcement of which rested in official discretion, said: "But because such discretion is given, are these and all similar enactments to be deemed imperfect and nugatory? It would take a bold man to affirm it. In what does this discretion consist? Certainly not in fixing the terms and conditions upon which the act may be performed, or the obligations thereupon attaching. These are all irrevocably prescribed by the Legislature, and, whenever called into operation, conclusively govern every step taken. The law is therefore perfect, final, and decisive in all its parts, and the discretion given only relates to its execution. It may be employed or not employed. If employed, it rules throughout. If not employed, it still remains the law, ready to be applied whenever the preliminary condition is performed. The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done. To the latter no valid objection can be made." And quoted the following language, with approval, from the very able opinion of Judge Marshall in *Slack v. M. & L. R. R. Co.*, 13 B. Mon. 1: "It is not essential to the character and force of a law that the legislative enactment should itself command to be done everything for which it provides. The legislative power to command a particular thing to be done includes the power to authorize it to be done. The act done under authority conferred by the Legislature is precisely as legal and valid as if done in obedience to a legislative command.

* * * So far as such a statute confers authority and discretion, it is as obligatory from the first as the legislative power can make it; and, although its further practical efficiency may depend upon the discretionary act of some other body or individual, it is not derived from that discretion, but from the will of the Legislature which

authorized the act and prescribed its consequences." In *Moers v. Reading*, 21 Pa. 202, it was said that "half the statutes on our books are all in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. It cannot be said that the exercise of such discretion is the making of the law." And in *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716, it was said that "to assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the Legislature of the power to act wisely for the public welfare whenever a law is passed relative to a state of affairs not yet developed, or to things future and impossible to be fully known. * * * Though contingent in form, the law is mandatory throughout in all it requires and all it determines. That is not less an act of sovereign power which says to the subject, 'Do this, and that shall follow; do that and another thing shall follow.' To the subject a discretion of acting is given, and, as he decides, the law pronounces the consequences. It is the sovereign which gives the law, not the subject. The true distinction is this: The Legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must therefore be a subject of inquiry and determination outside of the halls of legislation. * * * If the determining power cannot be conferred by law, there can be no law that is not absolute, unconditional, and peremptory; and nothing which is unknown, uncertain, and contingent can be the subject of law."

The distinction pointed out in the cases just referred to was approved by the Supreme Court of the United States in *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294, in which the tariff act of 1890, known as the "McKinley Act," was held valid as against the objection that it conferred legislative power upon the President, by authorizing him to suspend those provisions of the act relating to the free introduction of certain foreign products. It was said that "nothing involving the expediency or the just operation of such legislation was left to the determination of the President. * * * Legislative power was exercised when Congress declared that the

suspension should take effect upon the named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect." So, also, it was said in *San Antonio v. Jones*, 28 Tex. 19: "The Legislature may grant authority as well as give commands, and acts done under its authority are as valid as if done in obedience to its commands. Nor is a statute whose complete execution and application to the subject matter by its provisions made to depend on the assent of some other body a delegation of legislative power. The discretion goes to the exercise of the power conferred by the law, but not to make the law itself. The law in such cases may depend for its practical efficiency on the act of some other body or individual; still it is not derived from such act, but from the legislative authority. Legislation of this character is of familiar use, and occurs whenever rights or privileges are conferred upon individuals or bodies which may be exercised, or not, in their discretion." See, also, *Johnson v. Martin*, 75 Tex. 33, 12 S. W. 321; *State v. Wilcox*, 45 Mo. 458.

The Supreme Court of Nebraska had occasion, in the very recent case of *Woodrough v. Douglas County*, 98 N. W. 1092, to pass upon the very question we are now considering. The Nebraska act for the collection of real estate taxes by an action, like our own, was substantially adopted from Minnesota. It provided that "the county commissioners or board of supervisors of any county may by resolution adopted each year, elect to enforce the collection of delinquent taxes and assessments on real state under the provisions of this act, but are not required to do so." The contention that the act delegated legislative power was expressly overruled. The court said: "It is also contended that the act is void because it leaves the question of its enforcement to the arbitrary determination of the board of county commissioners, thus giving that body the power to suspend the operation of general and other revenue laws, contrary to the provisions of section 1, art. 3, of the Constitution. [Our section 25.] There is nothing in this contention. This act, taken in connection with the general revenue law, simply provides two methods of enforcing the collection of delinquent taxes and special assessments on real property. It does not delegate legislative power to the county commissioners, but gives them the option of a cumulative

remedy. The Legislature has declared what the law shall be when it takes effect; also upon what contingency it shall be put in operation; and when that contingency happens, it takes effect by legislative will. This does not amount to a delegation of legislative power. * * * The enforcement of the law in question is simply applying one of two methods of procedure to collect delinquent taxes, either of which the board is at liberty to choose. Therefore it is not open to the constitutional objection that it is a delegation of legislative authority.'

It is true that when the board passes the resolution provided by section 1, and thus elects to collect taxes upon the forfeited lands under the provisions of this act, all right, title or lien which the state has acquired under the sales made under section 1271, Rev. Codes 1899, is surrendered, and the state accepts in lieu thereof the rights prescribed by this act. See *McHenry v. Kidder County*, 8 N. D. 418, 79 N. W. 875, decided under a similar law. But it is the Legislature, and not the board of county commissioners, which declares this to be the consequence of the passage of the resolution.

The following additional authorities sustain our conclusion that the power conferred upon the boards of county commissioners by section 1 of this act is not a legislative power, but merely an administrative discretion which the Legislature had the right to confer: *Bank of Rome v. Village of Rome*, 18 N. Y. 38; *Starin v. Town of Genoa*, 23 N. Y. 439, 456; *Bank v. Brown*, 26 N. Y. 467; *Clark v. Rochester*, 28, N. Y. 605; *People v. Fire Ass'n*, 92 N. Y. 311, 44 Am. Rep. 380; *Matter of 34th Street R. R. Co.*, 102 N. Y. 343, 7 N. E. 172; *State v. O'Neill*, 24 Wis. 149; *State v. Sullivan*, 67 Minn. 379, 69 N. W. 1094.

The further contentions that this act violates section 11 of the state Constitution, which requires that "all laws of a general nature shall have a uniform operation," and also subdivision 23 of section 69, which provides that "the Legislative Assembly shall not pass local or special laws * * * for the assessment or collection of taxes," fall with the argument already considered, namely, that the act is in force as a law by virtue of the resolution of the board of county commissioners, instead of by the will of the Legislature, and is for that reason operative only in such counties as pass the resolution. It is urged (1) that this act does not have "a uniform operation," and therefore violates section 11, *supra*; and (2) that, in legal effect,

it is a local or special law for the collection of taxes, and violates subdivision 23 of section 69, *supra*. The inconsistency of these contentions is apparent, for the same law cannot be "of a general nature," and thus belong to the class which are required to have a uniform operation, and at the same time be a local or special law. It follows that this act cannot violate both of the constitutional provisions above referred to, for the reason that it cannot be at the same time a law of a general nature and a local or special law. It is clear to us, however, that it violates neither, for, in our opinion, it is not a local or special law, but is, on the contrary, a law of a general nature, and has a uniform operation, within the meaning of the above constitutional provisions. It is argued that the act is operative only in those counties which adopt the resolution referred to in section 1, and from this assumption the conclusion is drawn that it is a local, and not a uniform, law. The error lies in the assumption. If it were true that the act is in force only in those counties which pass the resolution, and in no others, the argument would have great weight. But as we have already seen, the act by the legislative will is made applicable to every county in the state. It does not apply to a single county, or to certain enumerated counties, or to counties belonging to an arbitrary class, but to every county in the state, regardless of whether they do or do not pass the resolution referred to in section 1. The remedy which is given for the collection of taxes upon the lands described in the act is given to each county in the state; may be set in motion by the same local authorities, namely, the board of county commissioners; the steps necessary to apply the remedy are the same; and the act declares the same consequences, in whatever county proceedings are taken under it. The resolution of the board does not adopt the act for that county, nor render it applicable. It is in force, applicable, and available before the resolution is passed. The resolution is passed by the board under the law, and by virtue of it, in the exercise of an administrative discretion, and merely constitutes the first step in the enforcement of the remedy therein provided.

The questions we have considered were before the Supreme Court of Iowa in *Dalby v. Wolf*, 14 Iowa, 228. It was contended in that case that an act of the Legislature which authorized the people of the several counties to decide by a majority vote to restrain swine and sheep from running at large was void for the same reasons urged here. This case is peculiarly in point, for the reason that the

constitutional provision requiring uniformity in operation of laws of a general nature, which is now found in the Constitutions of a number of states, had its origin in Iowa. The court said: "Plaintiff claims that this law is in conflict with section 6, art. 1, of the Constitution, which declares that 'all the laws of a general nature shall have a uniform operation,' and for the further reason that it depends for the validity upon the vote of the people, and is not the expressed will of the Legislature. Neither of these positions is tenable. They utterly mistake the intention of the constitutional provision quoted, and misapprehend the scope and spirit of the decisions in this and other states which hold that the Legislature cannot refer to the people the question whether a particular act shall become a law. In all the cases referred to, it will be found that, as in *Thorne v. Cramer*, 15 Barb. 112, and *Bradley v. Baxter* and others, *Id.* 122, the question submitted was whether or not a proposed law should become operative. Thus in the first case cited it was provided by the statute that 'the electors shall determine, by ballot, at the annual election to be held in November next, whether this act shall, or not, become a law.' If a majority voted against it, then it was to be null and void; if for it, then it was to take effect on a day named. And such legislation was expressly condemned by this court in *Santo v. State*, 2 Iowa, 165, 63 Am. Dec. 487, which was recognized and followed in *Geebrick v. State*, 5 Iowa, 491. The law in question, however, is not obnoxious to this objection. The popular will is expressed under and by virtue of a law that is in force and effect, and the people neither make nor repeal it. They only determine whether a certain thing shall be done under the law, and not whether said law shall take effect. The law had full and absolute vitality, when it passed from the hands of the Legislature, and the people, under the 'rule of action' therein given for their government, proceeded to act. The same rule—the same law—was given to all the people of the state, to all parts of it; the same method for taking the vote was presented for all the counties; the same penalties were attached. As a result of the vote, a different regulation, of a police nature, might exist in one county from what existed in another, just as, under the same section [114], one county might determine by a popular vote that a higher rate of tax should be levied than that provided by the general law, when the county warrants were depreciated, while another voted against it. So it is in principle like the provision which submits the question whether money should be

borrowed to aid in the erection of public buildings. One county might decide in favor of such loan, while another rejected it, and yet the law under which they vote is operative and in full effect. Not only so, but it gives a uniform rule to all the people and all the counties alike."

See, also, *People v. Judge, etc.*, 17 Cal. 554; *French v. Teschemaker*, 24 Cal. 544; *Brooks v. Hyde*, 37 Cal. 366; *Ex parte Smith*, 38 Cal. 702; *People v. C. P. R. R. Co.*, 43 Cal. 398; *Kelley v. State*, 6 Ohio St. 270; *McGill v. State*, 34 Ohio St. 228—in which the "glittering generality of the language" of section 11 has been considered and construed.

Our own court, speaking through Mr. Justice Bartholomew, in *Vermont Loan & Trust Co. v. Whithed*, 2 N. D. 82, 49 N. W. 318, in harmony with the opinion of other courts, said: "The uniform operation required by this provision does not mean universal operation. A general law may be constitutional and yet operate in fact only upon a very limited number of persons or things, or within a limited territory. But so far as it is operative, its burdens and benefits must bear alike upon all persons and things upon which it does operate, and the statute must contain no provision that would exclude or impede this uniform operation upon all citizens, or all subjects and places, within the state, provided they were brought within the relations and circumstances specified in the act." See, also, cases cited in opinion. It has already been noted that the act under consideration contains no provision restricting its operation. On the contrary, it is in force and available in every county in the state. It is probable that all counties will not avail themselves of the remedy provided by this act at the same time. Some may proceed in one year, others later, and some possibly not at all. The rights of the county and the state, as well as the tax debtor, in reference to these forfeited lands, in counties where the remedy is invoked, will be different from those which exist in counties where it is not resorted to. This, however, is merely a difference arising from the application of different remedies. The consequences are the same in each county in which the remedy is applied, and, as we have seen, it is applicable to every county in the state. That satisfies the requirement of the Constitution that laws of a general nature shall be of uniform operation. This provision does not require uniformity in the execution of laws. If it did, practical legislation would be

quite impossible. It was contended in *Groesch v. State*, 42 Ind. 547, that a license law which committed to the board of county commissioners the discretion to issue permits to sell intoxicating liquor violated the constitutional provision which required that "all laws shall be general and of uniform operation throughout the state." The court said: "Is the act in question, or the parts or features thereof which are in question, general and of uniform operation throughout the state? We think the act is general. It is in force and operation in all parts of the state. It is only in a qualified sense that any law can be said to be of uniform operation throughout the state. A law for the punishment of crime, the provisions of which are alike applicable to all parts of the state, must necessarily lack uniformity, in one sense, in its operation, not only as to persons, but also as to localities. It operates in those places where its provisions are violated, and upon those persons who transgress them. Under the same circumstance and conditions its operation is uniform. The law which affords civil remedies is uniform in its provisions, and, under the like circumstances, is uniform in its operation throughout the state. It is not required that every man shall resort to that remedy, or that in each locality there shall be the same number or any number of persons who shall resort to the remedy, in order to make the law uniform in its operation, in the sense in which the terms are used in the Constitution. Such is the case, under all circumstances, when one or more persons are by law required to do some act or acts, upon or in consequence of which the law is to operate." The same contention was urged in *Leavenworth v. Miller*, 7 Kan. 479. 12 Am. Rep. 425. In denying it, and holding that an act authorizing counties to subscribe for stock, and to issue bonds to aid in the construction of railroads, did not violate this provision, the court said: "The act under consideration is so obviously in harmony with this section that the question attempted to be raised upon its supposed incongruity needs no elucidation from us. All the provisions of said act are expressly enacted for the whole state, and for every part of the state; and it is no more necessary that the same amount of stock be taken in each and every county in the state, in order that the act shall have a uniform operation therein, than that the same number of men shall be executed in each county of the state, in order that the law punishing murder in the first degree shall have a uniform operation throughout the state." See also, *Haney v. Commissioners*, 91 Ga.

770, 18 S. E. 28; *Hellman v. Shoulters*, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057. The case last cited is particularly in point, for it holds that an act which gave an alternative mode of procedure for making street improvements differing substantially in its consequences from one already existing, and leaving the choice of modes to the judgment of the city council, did not violate the constitutional provision requiring uniformity of operation. The court said: "If the subjects upon which the law is to operate are municipalities, it is obvious that the fact that alternative modes of procedure are open to the choice, or submitted to the judgment, of the council, is no proof of lack of uniformity." This, as we have already seen, was the view of the Supreme Court of Nebraska in reference to an act like that under consideration.

This is the third law of this nature enacted by the Legislature of this state. The first act (chapter 67, p. 76, of the Laws of 1897) was available for only a single effort, and authorized judgment for only such real estate taxes as were delinquent in 1895 and prior years. Only a limited number of counties took advantage of that act. The second act (chapter 161, p. 213, of the laws of 1901) attempted to extend the remedy given by the 1897 act to those counties which had not proceeded under it. The act, by express terms, was operative only in counties which had not proceeded under the former act. In addition to this limitation, it gave to the counties wherein it was operative a right to include in the action subsequent taxes for a number of years. This remedy, by the very terms of the act was denied to those counties wherein the act was not operative. For this reason, we held that the act was a special law for the collection of taxes in certain counties only, and in conflict with subdivision 23 of section 69 of the state Constitution. *Cass County v. Bank*, 9 N. D. 265, 83 N. W. 12. The present act is not open to this objection, for, as we have seen, it is applicable to all the counties in the state upon the same terms, and is uniform in operation, within the meaning of the Constitution.

It follows from what we have said that the demurrer was properly sustained. Judgment affirmed. All concur.

(100 N. W. 711.)

DOWAGIAC MANUFACTURING COMPANY v. O. H. HELLEKSON.

Opinion filed July 5, 1904.

Provisions of Written Contract May Be Waived by an Executed Parol Agreement.

1. Where a contract provides that "settlements of accounts governed by it are to be consummated only by written approval of said party of the first part from its home office," the parties may make a valid settlement under such contract, although the settlement is not made or approved in writing.

Same.

2. Under a contract containing such provisions as to the approval of settlements in writing, a settlement made by an agent duly authorized to make a settlement under such a contract in a particular case—such settlement being duly executed—is binding upon the principal, and it will not be heard thereafter to repudiate such settlement, although not approved in writing.

Retention of Money Received on a Settlement Ratifies Agent's Acts Therein.

3. Where a principal retains money paid on a settlement, with knowledge of all the facts pertaining to such settlement, it is a ratification of such settlement, although made by an agent without authority to make final settlements.

Court's Findings Set Aside Only When Clearly Against Evidence.

4. Findings of facts made by a trial court in an action at law, a jury being waived, are presumed to be correct, and will not be set aside unless shown to be clearly against the preponderance of the evidence.

Appeal from District Court, Cass county; *Pollock, J.*

Action by the Dowagiac Manufacturing Company against O. H. Hellekson. Judgment for defendant, and plaintiff appeals.

Affirmed

Newman, Spaulding & Stambaugh, for appellant.

Where title to goods sold is reserved by the seller as security only, he can waive the security and sue for the purchase price. Appeal of Beach, 20 Atl. 475; Bessinger Co. v. Cain, 18 S. W. 136; Monroe v. Williams, 15 S. E. 279; Crompton v. Beach, 25 Atl. 446; Campbell Co. v. Rocaway, 29 Atl. 681; Truax v. Parvis, 32 Atl. 227; Earl v. Robinson, 33 N. Y. Supp. 606; Parlin Co. v.

Moline Co. 27 S. W. 1087; Singer Mfg. Co. v. Hatley, 21 Pac. 384; Burmley v. Tufts, 5 So. 627.

Whenever the parties to a contract have agreed upon the manner in which the rights under the contract shall rest, or be divested or effected, that method is exclusive. *Hankins v. Rockford Ins. Co.*, 35 N. W. 34; *Zimmerman v. Home Ins. Co.*, of New York, 42 N. W. 462; *Smith v. Ins. Co.*, 15 Atl. 353; *Marvin v. Ins. Co.*, 85 N. Y. 278; *Kyte v. Commercial Union Assurance Co.*, 10 N. E. 518; *Cleaver v. Traders' Ins. Co.*, 32 N. W. 660; *Walsh v. Ins. Co.*, 73 N. Y. 5.

F. W. Murphy and Charles A. Tuttle, for respondent.

Where the seller retains title to goods sold to secure the purchase price, he must pursue his remedy under the code, and cannot without the consent of the purchaser treat it as an absolute sale and sue for the purchase price. *Minneapolis Threshing Machine Co. v. McDonald*, 87 N. W. 993; *Stanford v. McGill*, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760.

If the principal elects to ratify any part of an unauthorized act, he must ratify the whole. He cannot retain what is advantageous to him and reject the rest; and the rule applies to an implied ratification as well as an express one. *McClure v. Briggs*, 58 Vt. 82; *Eberts v. Selover*, 44 Mich. 519; *Henderson v. Cummings*, 44 Ill. 325; *Crans v. Hunter*, 28 N. Y. 389; *Reid et al. v. Hibbard*, 6 Wis. 175; *Cushman v. Lochre*, 2 Mass. 106; *Parish v. Reeves*, 23 N. W. 568; *Bacon v. Johnson*, 22 N. W. 276; *Mechem on Agency*, section 148.

The principal must act promptly upon receiving information. *Ward v. Williams*, 26 Ill. 447, 79 Am. Dec. 385, 30 Am. Dec. 718; *Foster v. Rockwell*, 104 Mass. 167; *Kelsey v. National Bank of Crawford*, 69 Penn. St. 426.

Whether repudiation was had in time was a question for the court. *McDermid v. Cotton*, 70 Am. Dec. 298. Unless the principal dissents and gives notice of his nonconcurrence within a reasonable time, his assent and ratification will be presumed. *Mobile & Montgomery Ry. Co. v. Jay*, 65 Ala. 113; *Kelsey v. National Bank*, 69 Penn. St. 426; *Searing v. Butler*, 69 Ill. 575.

A clause in an agreement that no one has any authority to add to, abridge or change in any manner, does not invalidate a waiver of the provisions of an agreement by an agent of a corporation,

one of the parties. *D. M. Osborn & Co. v. Backer*, 47 N. W. 70; *Hunter v. Cobe*, 87 N. W. 612; *Carrigan v. Lycoming Fire Insurance Co.*, 53 Vt. 418.

A general agent is deemed possessed of all the powers of an agent at the head office. *Kerr on Ins.* 183; *Coles v. Jefferson Ins. Co.*, 23 S. E. 732; *May on Insurance* 126; *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. St. 460; *Dwelling House Ins. Co. v. Dowdall*, 42 N. E. 606; *Phenix Ins. Co. of Brooklyn v. Cadwell*, 58 N. E. 314.

MORGAN, J. In the year 1901 plaintiff and defendant entered into a written contract under which defendant was to sell at Fairmount, N. D., and all territory tributary thereto, the grain-seeding machinery manufactured by plaintiff at Dowagiac, Mich., during the year 1902. The contract provided for a settlement of accounts on May 1st, as all sales for the year were deemed to have been made by that date. The contract also provided that, if payments were made for sales of that year by June 1st, certain discounts would be made by plaintiff. The contract also contained the following clause: "This agreement and settlements of accounts governed by it are to be consummated only by written approval of said party of first part from its home office at Dowagiac, Michigan, and upon this and all future shipments, no other contract and no agreement, consideration or stipulation, modifying or changing the tenor hereof, shall be recognized or binding, unless they are so approved."

The principal question at issue is upon the validity of a settlement made by a general agent of the company with the defendant. The facts under which such settlement was made are the following: On March 31st defendant sent to the general agent of the company a check for \$283.77, with a letter accompanying the check. The letter is not in evidence, and its contents are not given. The general agent sent the check to the company at its home office, and on April 3d the company wrote defendant that the remittance was not enough, by \$14.96, and explained wherein it did not represent the full amount due, as it construed the contract; and the letter further stated that the check would be held by it pending a reply to the letter. Defendant did not reply to the letter, nor was anything done or said by plaintiff in reference thereto until the following July, when the plaintiff requested one Swayne, plaintiff's general agent in this state, to go to Fairmount for the purpose of making a settlement with the defendant for all matters

arising out of the contract, including the dispute that had arisen as to the sum to be remitted, over and above the sum of \$283.77, remitted on March 31st, if any. The general agent went to Fairmount, and, after going over the entire account, and all transactions connected with or growing out of the contract, arrived at a settlement. This settlement included in its terms the amount due the plaintiff on account of the goods furnished under the contract, and the disposition of the unsold goods that defendant had on hand, and payment for repairs. The agent took from defendant what is called in the record a "warehouse receipt," and sent it with a letter, and \$14.96, the amount agreed on as due from the defendant, to the company, at Dowagiac, Mich. The receipt taken by plaintiff's agent at this time contained a list of the unsold goods, and provided that they should be safely kept and fully insured by defendant until February, when defendant would again purchase them under the same terms as stated in the 1901 contract. The agent transmitted the check and the receipt to the company at Dowagiac on or about July 12th. The company replied to said letter containing the check and receipt, by writing the defendant on August 5th, nearly four weeks after its receipt. In this reply plaintiff claimed that the settlement was not in accordance with the contract, and that, defendant not having settled for all matters pursuant to the terms of the contract, defendant owed the company in cash for all goods received, at list price. In other words, it charged defendant with all the goods sent him at list prices. Plaintiff returned the receipt, but kept both checks, but offered to accept defendant's secured note for the amount claimed to be due and unpaid. The defendant did not answer this letter, but wrote the general agent concerning it, and stated to him that he would not comply with the company's demands, but would stand on the settlement made with him as general agent. This suit was thereafter commenced, and judgment demanded for the whole amount of the goods delivered, at list prices; being the sum of \$609.67, with interest thereon at 8 per cent since May, 1902, over and above all payments made by defendant.

The answer denies that any sum is due plaintiff, as all matters in difference between the parties were duly settled and full payment made on July 12, 1902. The issue presented is whether the settlement of July 12th is a binding one. Plaintiff insists that no settlement could be made by the general agent unless followed by the

written approval of the company at its home office. Defendant insists (1) that the agent, Swayne, was general agent of the company, and had authority to settle with defendant under his general authority or powers; (2) that express authority was conferred on him by the plaintiff to settle with defendant, and (3) if such settlement was unauthorized, plaintiff has ratified it by retaining the money paid by virtue of and under the terms of said settlement. The arguments on behalf of the parties are mostly directed to the question as to whether there was a binding settlement under the contract, or not. The effect of the clause of the contract quoted is to restrict the right of agents to settle disputed matters growing out of these contracts. The agents have no right to make these settlements on their own responsibility. The agent cannot effectually make a settlement under this clause unless he has special authority so to do, or has general authority sufficiently broad to include settlements under this contract.

We do not agree with plaintiff's contention that such a clause in such a contract cannot be modified by subsequent acts, or ratified by subsequent acts or waived. This provision of the contract is not to be subjected to a different construction than any other of its terms. To say that this clause of the contract renders all settlements thereunder invalid, however made, unless evidenced by written approval of the home office, is to say that parties have no right ever to change what they have agreed to do, or their manner of doing it. If this is true, it gives to this contract a character that does not ordinarily belong to contracts. In *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143, the court said: "The powers of Atwater in the present case do not appear to be restricted in any way. The condition, literally applied, would prevent any unendorsed consent by the company itself, by resolution of the board, or by act of its officers, as effectually as by any one else." And the case seems to settle down to the simple question whether a person who has agreed that he will only contract by writing in a certain way precludes himself from making a parol bargain to change it. The answer is manifest. A written bargain is of no higher legal degree than a parol one. Either may vary or discharge the other, and there can be no more force in an agreement not to agree by parol than in a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it." When the contract prescribes

the manner in which it may be modified, waived, released, or approved, it is competent for the parties to modify it or release it or approve it in a different manner by a valid contract that is executed and an unauthorized change of a contract as to the manner in which a contract may be approved or released may be ratified in the same manner by the principal, having notice of all the facts. *Coles v. Jefferson* (W. Va.) 23 S. E. 732; *D. M. Osborne Co. v. Backer* (Iowa) 47 N. W. 70; *Cyc.*, vol. 9, p. 599, and cases cited; *Day v. Mechanics' Ins. Co.*, 88 Mo. 325, 57 Am. Rep. 416; *McFadden v. O'Donnell*, 18 Cal. 160; *Erskine v. Johnson*, 23 Neb. 261, 36 N. W. 510. The contract was one, therefore, that the parties might modify in the respect in which settlements might be made thereunder. It remains to determine whether there was a valid modification thereof by the parties under a valid authorization delegated to plaintiff's agent, either by general authority or by special authority given in respect to this settlement alone.

It is not denied that the agent and defendant made a settlement of some matters. That it was a final settlement of all matters arising under the contract is denied by plaintiff, and plaintiff also claims that the alleged settlement made by the agent was of no effect, because not approved in writing at the home office. The trial court made the following finding bearing on this question: "That thereafter a dispute arose between the parties with reference to a settlement between them of the transactions had under the terms of Exhibit A, above referred to, for the year 1902, whereupon, on or about the 12th day of July, 1902, at the request of the plaintiff, S. C. Swayne, its general agent, went to Fairmount for the purpose of making a settlement with the defendant for such transactions and for all matters under said contract, Exhibit A; and, after going over the entire account and all matters connected therewith, said Swayne received from the defendant, in full settlement of all matters connected with said contract, Exhibit A, and the transactions aforesaid, a check for the sum of \$14.96, balance of cash, which was to be in full for all drills and property sold in said year 1902 by the defendant for the plaintiff; and at the same time, and as a part of the same transactions, said Swayne took and received from the defendant a warehouse receipt * * * which covered all of said property * * * which had not been sold and remained in the possession of the defendant." Parts of this finding are excepted to, as not sus-

tained by the evidence, and the insufficiency of the evidence pointed out—that is, the part to the effect that a “dispute arose”—and the closing part, reciting the fact of and the terms of the settlement, are excepted to as not sustained by the evidence. But the part of the finding that finds that Swayne went to Fairmount at plaintiff’s request for the purpose of making settlement of all matters under said contract is not excepted to, nor is there any specification in the settled statement that the evidence is insufficient to sustain such finding, and the part of the finding quoted, that Swayne was requested by plaintiff to go to Fairmount to settle all matters with the defendant, is nowhere challenged by a specification that such part of the finding is not sustained by sufficient evidence. This finding is not attacked in any way on the motion for a new trial in the settled statement, and it cannot now be urged that it is not sustained by the evidence. Other facts found are attacked as not sustained by sufficient evidence, and the contention that they are not sustained by the evidence overruled by us; but we hold that the question whether the finding of fact that Swayne went to Fairmount at plaintiff’s request to settle all matters is not before us for consideration, and that the motion for a new trial was properly denied. Section 5467, Rev. Codes 1899, provides that, if no specifications of the insufficiency of the evidence are contained in the settled statement, the settlement shall be disregarded on the motion for a new trial and on appeal. The record therefore presents as undisputed the facts that Swayne was the general agent of the plaintiff in North Dakota, and had charge of the plaintiff’s business in this state generally. His duties are stated by himself as “solicitor of contracts, negotiator of settlements, and looking after the business generally for the Dowagiac Manufacturing Company in this territory.” He further testified that, when he went into a town in which no settlement had been made with their agent, he settled with him, and that he had 180 settlements to make that year, and that the form of receipt given the defendant was the form “used in carrying over the drills from one year to another with every man who dealt with the Dowagiac Manufacturing Company in the state of North Dakota under that kind of contract.” We need not pass upon the question raised in the case, whether Swayne had the power by virtue of the general authority conferred on him to bind the plaintiff by a settlement made by him without special authority given him in a particular

case. He was sent to Fairmount to settle with the defendant. He did settle with him. He was not sent there to negotiate a settlement. The whole matter was turned over to him to settle. A dispute as to the sum due on the 1902 business had arisen, and had been pending since about March 31st. Defendant had remitted the amount due in accordance with his understanding and construction of the contract. Plaintiff declined to accept defendant's construction of the contract, and had explained its position by letter, and demanded \$14.96 more before that part of the business could be settled. Under the contract, settlements were to be made by May 1st. This time had passed, and defendant had made no settlement, except such as had been submitted in the letter of March 31st, and this had been rejected by plaintiff. Three months had passed without negotiations, and matters were at a standstill. This was the situation when plaintiff sent Swayne to settle with defendant. He was not sent there to submit propositions. Everything was left with him to settle. He did settle everything from the acceptance of the sums found due for repairs and for drills to the disposition of the goods on hand unsold. It is contended that, because defendant violated his contract, and sold other drills contrary to its terms, plaintiff is entitled to a recovery for all goods delivered to defendant, at list prices. This was one of the matters in issue and was talked over between Swayne and defendant at the settlement, and it was then settled and agreed that the unsold goods should be stored by defendant as plaintiff's property, fully insured as such, and repurchased in February, under specific terms in writing. Under the contract, this could be done by the plaintiff, and, having left the settlement of the matters to Swayne, he had the same right to do so as the company itself had. The company authorized Swayne to represent it at the settlement, and his action was final and beyond plaintiff's power to repudiate after the defendant had acted by settlement with him. As stated before, the company could modify the contract in respect to the manner of settlements. It could make one without written evidence thereof. The agent, Swayne, could do the same without plaintiff's written approval, as he had been previously commissioned with authority to settle with defendant. This clause of the contract that settlements must be approved in writing was waived by plaintiff by authorizing Swayne to settle with defendant. It is claimed that there was no modification of the contract; that a settlement was made, but was not evidenced as the

contract provided, and such settlement was made by authority expressly given, and its provisions carried out. Whether the contract was modified or not need not be determined, as it was performed and executed; and, if modified, therefore, it was permissible, under section 3936, Rev. Codes 1899, providing that written contracts may be altered by an executed oral agreement.

The finding that there was a dispute between the parties as to settlement of matters arising under the contract during 1902 is excepted to and challenged as not sustained by the evidence, and the particulars wherein the evidence is insufficient to sustain it pointed out. This is not an appeal under the provisions of section 5630, Rev. Codes 1899, but is an appeal from a judgment rendered by the court in an action at law in which trial by a jury was expressly waived, and findings of fact and conclusions of law duly made by the trial court, and a motion for a new trial made and denied. We are therefore properly asked to review the sufficiency of the evidence to sustain the findings thus excepted to. The findings themselves are presumed to be correct, and to be sustained by the preponderance of the evidence. The weight to be given findings of fact, when properly challenged on appeal, is clearly stated in *Jasper v. Hazen*, 4 N. D. 1, 58 N. W. 454, 23 L. R. A. 58, as follows: "Rather, it intended * * * that, when a finding of fact made by the trial court was brought into this court for review upon proper exceptions, it should come like a legal conclusion, with all the presumptions in favor of its correctness, and with the burden resting upon the party alleging error of demonstrating the existence of such error. He must be able to show this court that such finding is against the preponderance of the testimony, and, where the finding is based upon parol evidence, it will not be disturbed unless clearly and unquestionably opposed by the preponderance of the testimony." *Fisher v. Trust Company*, 21 Wis. 73; *Randall v. Burk Tp.*, 4 S. D. 337, 57 N. W. 4. The evidence is conflicting as to whether the receipt was given and received unconditionally, or whether it was to be subject to the approval of the company. The agent, Swayne, says that it was not unconditionally accepted by him, but that it was to be submitted to the company for final acceptance. The defendant says that, when it was delivered, nothing was said about its being subject to approval by the company. The defendant says that every difference between them was satisfactorily adjusted. That disputes existed

is shown beyond all question. They related to the amount due, and the effect of having sold other drills in disposing of unsold goods. It is difficult to determine from a record of the testimony given which of two witnesses is truthful, in the absence of some fact or circumstance shown by the record that is of controlling weight. There is nothing in this record of such controlling nature. The trial court had the advantage of seeing the witnesses, and of observing them while testifying. After carefully considering all the evidence, we are not able to say that the finding is against the preponderance of the evidence. We have examined all the cases cited by plaintiff on this point, and find them inapplicable. If plaintiff had not requested Swayne to go and settle with the defendant, or no ratification had followed, the cases would be in point.

If the settlement be conceded to have been made without authority, the result would be the same, so far as this appeal is concerned. The retention of the money paid on the strength of the settlement had the effect of ratifying the unauthorized act. By keeping what was paid as part of the settlement, the settlement was recognized as binding. A person cannot ratify a settlement, so far as satisfactory, and repudiate the part objected to. The settlement must be dealt with, if unauthorized, in its entirety. It must be accepted as a whole, or entirely repudiated. It is not sufficient to say that defendant paid only what was legally due. That may be true, although not conceded. Still, defendant believed that he had paid what was due in March, and the claimed deficiency on the payment of March 31st was made up by paying \$14.96 more, as part of the settlement. The agents made concessions, and defendant made concessions, resulting in this settlement of July 11th, under which all differences were adjusted, as stated by defendant in his testimony. In *Strasser v. Conklin*, 54 Wis. 102, 11 N. W. 254, it was said: "No rule of law is more firmly established than the rule that if one, with full knowledge of the facts, accepts the avails of an unauthorized treaty made in his behalf by another, he thereby ratifies such treaty, and is bound by its terms and stipulations as fully as he would be, had he negotiated it himself. Also a ratification of part of an unauthorized transaction of an agent is a confirmation of the whole. * * * If not authorized, the plaintiff, by receiving the money with full knowledge of the terms of settlement, ratified and confirmed what he did, and cannot now be heard to allege his agent's want of authority." See, also, *Mechem* on

Agency, section 148, and cases cited; Enc. Law, vol. 1, p. 1201, and cases cited; McClure v. Briggs, 58 Vt. 82, 2 Atl. 583, 56 Am. Rep. 557; Hinman v. Austin Mfg. Co. (Neb.) 90 N. W. 934; Eberts v. Selover, 44 Mich. 519, 7 N. W. 225, 38 Am. Rep. 278; Henderson v. Cummings, 44 Ill. 325; Crans v. Hunter, 28 N. Y. 389.

The judgment is affirmed. All concur.

(100 N. W. 717.)

ALBERT WREGE v. JOHN R. JONES.

Opinion filed July 5, 1904.

One Slander Cannot Be Pleaded as a Counterclaim Against Another.

1. Subdivision 1 of section 5274, Rev. Codes 1899, which permits a defendant to plead as a counterclaim "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim," does not authorize one slander to be set up against another, although both are uttered at the same time and place, and in the same conversation. Each slander constitutes a separate transaction, within the meaning of the above section.

Under Section 5289 Rev. Codes 1899, Both Justification and Mitigation May Be Pleaded.

2. Under our statute (section 5289, Rev. Codes 1899), a defendant in an action for slander or libel may answer by way of justification and mitigation—either or both—and may plead mitigating circumstances in connection with a general denial.

Where the Words Spoken Are Slanderous Per Se, Malice Is Conclusively Presumed.

3. Where words are spoken which are slanderous per se, malice is conclusively presumed, for the purpose of recovering actual damages. The malice which by legal fiction is thus presumed to exist is malice in law, or legal malice, as distinguished from malice in fact, or actual malice.

Punitive Damages Dependent Upon Actual Malice — Defendant May Testify as to Intent or Motive.

4. In an action for libel or slander, the right to recover punitive damages depends upon the presence of actual malice; and, where such damages are claimed, the presence or absence of actual malice, and its degree, is a vital and material question. In such cases the defendant may, under a sufficient answer, testify directly to his intent or motive, and also as to facts and circumstances which were within his knowledge and relied upon by him which tend to character-

ize his motive. In this case the defendant, under a plea in mitigation, offered evidence as to his motive in speaking the slanderous words which he is charged with uttering, and also as to the facts and circumstances which prompted their utterance. *Held*, that the exclusion of this evidence was prejudicial error.

Appeal from District Court, Richland county; *Cowan, J.*

Action by Albert Wrege against John R. Jones. Judgment for plaintiff. Defendant appeals.

Reversed.

McCumber, Forbes & Jones, for appellant.

One tort may be set up as a counter-claim against another where they both arise out of the same transaction. *Pelton v. Powell*, 71 N. W. 887; *Barholt v. Wright*, 12 N. E. 185; *Gutzman v. Clancy*, 90 N. W. 1081; *Wallace v. Homestead Co. et al.*, 90 N. W. 835; *Maxwell on Code Pleadings*, chapter 12, p. 544; 22 Am. & Eng. Enc. Law, 359.

The counter-claim arose "out of the transaction set forth in the complaint" and was "connected with the subject of the action;" and plaintiff was insolvent, so the demurrer was improperly sustained. *Braithwaite v. Akin*, 3 N. D. 365, 56 N. W. 133; *Brady v. Brennan*, 25 Minn. 210; *Lahr v. Kraemer*, 97 N. W. 418; *Jourdain v. Luchsinger*, 97 N. W. 740; *Doysher v. Adams*, 29 S. W. 348.

If conversation did not as a whole constitute a slander, plaintiff has no cause of action. *Kidd v. Ward*, 59 N. W. 279.

If words charging one with being a thief or of lack of chastity were not intended by defendant nor understood by the hearers to so impute defendant would not be liable. *Egen v. Semrad*, 88 N. W. 906; *Emmerson v. Miller*, 88 N. W. 803; *Berry v. Massey*, 3 N. E. 942; *McCarthy v. Barrett*, 12 Minn. 398.

In an action for slander in charging plaintiff with stealing a horse, defendant could prove that certain persons had told him that plaintiff had stolen a horse. *Hudson v. Dale*, 19 Mich. 16. Under the general issue, defendant may show in mitigation of damages that previous to the publication of the slanderous words by himself, similar reports were in circulation and communicated to the defendant. *Hewitt v. Pioneer Press Co.*, 23 Minn. 178; *Farr v. Rasco*, 9 Mich. 353; *Marks v. Baker*, 9 N. W. 678; *Allen v. Crofoot*, 2 Wend. 515; *Dell v. McBride*, 95 N. W. 717.

It was error not to permit defendant to prove that in a previous conversation between him and the plaintiff on the same day, that

plaintiff had slandered defendant by calling him a thief, and otherwise. *Warner v. Lockerby*, 31 Minn. 421, 18 N. W. 145, 821; *Jauch v. Jauch*, 50 Ind. 135.

The witness should have been permitted to testify as to the meaning he placed upon the slanderous words. *Nedever v. Hall*, 7 Pac. 136.

Defendant may show in mitigation of damages that he was not actuated by any ill will or malice toward the plaintiff and did not intend any injury or damages. *Plank v. Grimm*, 22 N. W. 470; *Kerrains v. People*, 60 N. Y. 221; *Krippner v. Biebl*, 28 Minn. 139, 9 N. W. 671; *Williams et al. v. Fuller*, 94 N. W. 118.

Intent may be proved like any other fact, and a witness may be asked with what intent he did an act. *Seymour v. Wilson*, 14 N. Y. 567; *Griffin v. Marquardt*, 21 N. Y. 121; *State v. Crawford*, 71 Pac. 1030. Intention is a question of fact for the jury. *St. Martin v. Desnoyer*, 1 Minn. 131; *Townsend on Slander & Libel*, section 91; *Marks v. Baker*, 9 N. W. 678; see *Wilson v. Noonan*, 35 Wis. 321; *Smith v. Higgins*, 82 Mass. 251; *Kansas v. Carlisle*, 108 Fed. 344.

When so requested the court should always charge the jury as to the burden of proof. 5 Am. & Eng. Enc. Law, 23; *Finley v. Widner*, 70 N. W. 433; 1 Jones on Evidence, section 176. Abusive language by plaintiff toward defendant is admissible in mitigation of damages. *Warner v. Lockerby*, 18 N. W. 145; *Jauch v. Jauch*, 50 Ind. 135.

D. A. Dwyer and Chas. E. Wolfe, for respondent.

One libel or slander cannot be set off against another. 13 Enc. Pl. & Pr. 89; *Townsend on Slander and Libel* (3d Ed.) section 362; sections 5274, 5288 and 5289, Rev. Codes; *Brathwaite v. Aiken*, 3 N. D. 365, 56, N. W. 133; 22 Am. & Eng. Enc. Law, 239, 245, 267; 13 Am. & Eng. Enc. Law, 477; *Bishop on Noncontract Law*, p. 123, section 292; *Allen v. City of Davenport*, 87 N. W. 743; *Golberg v. Dobbartine*, 28 L. R. A. 721.

Five hundred dollars damages are not excessive. *McMinemee v. Smith*, 93 N. W. 75; *Bowe et al. v. Rogers et al.*, 7 N. W. 547; *Stumer v. Pichman*, 15 N. E. 757; *Upham v. Dickenson*, 50 Ill. 97; *Miller v. Johnson*, 79 Ill. 59; *Douglass v. Tousey*, 2 Wend. 352.

Where the words are actionable per se, and impute the commission of a crime, the intention with which they were uttered is

immaterial. 13 Enc. Pl. & Pr. 256; *Hinchman v. Knight*, 94 N. W. 1; *Whiting v. Carpenter*, 93 N. W. 926; *Bigelow Odgers on Libel and Slander*, Am. Ed. 5; 3 *Sutherland on Damages*, 650; *Hamlin v. Fautl*, 95 N. W. 955; *Kacker v. Heiney*, 87 N. W. 249.

YOUNG, C. J. This is an action for slander. The plaintiff recovered a verdict in the sum of \$500. The defendant has appealed from the order denying his motion for new trial, and also from the judgment.

The complaint alleges that on October 3, 1902, the defendant, in the village of Hankinson, in Richland county, in the presence of divers persons, four of whom are named, falsely and maliciously spoke and published of and concerning the plaintiff the following false, malicious, and defamatory words: "‘You stole my wheat’ (meaning thereby that this plaintiff stole wheat owned by defendant). ‘Mr. Albert Wrege stole my wheat. I will have you both arrested’ (meaning thereby that the defendant would have this plaintiff and his brother arrested for the alleged offense)." The answer interposed by the defendant consisted of (1) a general denial; (2) mitigating circumstances; and (3) a counter-claim. The trial court held upon demurrer that the cause of action set up as a counter-claim did not arise out of the transaction which is the foundation of plaintiff's claim, and was not, therefore, allowable. The case was tried upon the remaining issues, with the result above stated.

The first error assigned is the ruling upon the demurrer. The answer alleged, by way of counterclaim, "that on said October 3, 1902, and at the same time and at the same place, and as a part of the same conversation and transaction mentioned and referred to in the complaint, and in the presence of the same persons who are named and mentioned therein, the said plaintiff falsely and maliciously spoke the following false, slanderous, and defamatory words of, about and concerning the plaintiff, to wit: ‘Jones, you are a damned robber.’" Damages were prayed for in the sum of \$3,000. Counsel for defendant urge that "the cause of action set up in the complaint and the cause of action contained in the counterclaim arose out of one and the same transaction," and that for this reason the counterclaim is within section 5274, subd. 1, Rev. Codes 1899, which authorizes one to plead as a counterclaim "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action."

We cannot agree that the transaction out of which defendant's cause of action arose is the "transaction set forth in the complaint as the foundation of the plaintiff's claim," and are therefore of opinion that the demurrer was properly sustained. The statute just referred to is common to a number of states. Thus far the courts have not arrived at a definition of the term "transaction," as used therein, which is wholly satisfactory. It is quite generally agreed, however, that it is broader in meaning than the word contract," and includes torts; otherwise it would not have been employed. Probably the definition given in Pomeroy on Code Remedies, section 774, is the most accurate and comprehensive, i. e., "that combination of acts and events, circumstances and defaults, which, viewed in one aspect, results in the plaintiff's right of action, and, viewed in another aspect, results in the defendant's right of action." The fact that two transactions originate at the same time and place, and between the same parties, is not the test. The question in such cases is, "Did each cause of action accrue or arise out of the same transaction—the same thing done?" *Anderson v. Hill*, 53 Barb. 239. It is clear in this case that they did not. The act set forth in the complaint as the foundation of plaintiff's claim, and which gave rise to his cause of action, was the speaking by defendant of the defamatory words charged in the complaint. The act which gave rise to the defendant's cause of action was the speaking by plaintiff of the defamatory words charged in the counterclaim. Each act was complete in itself—a separate tort—and constituted a transaction, within the meaning of the above section. It cannot be said that the utterance of the slanderous words by the defendant resulted in a cause of action in his favor for the plaintiff's tort. The latter arose from a wholly distinct act, namely, plaintiff's utterance of the slanderous words. There was no single transaction, which, "viewed in one aspect," gave plaintiff's right of action, and, in another aspect, defendant's right of action. The transactions were separate. Our conclusion that one slander cannot be set up as a counterclaim against another slander is in harmony with the views of the courts of New York under the same statute (*Sheehan v. Pierce*, 70 Hun, 22, 23 N. Y. Supp. 1119; *Fellerman v. Dolan*, 7 Abb. Prac. 395), and, by parity of reasoning, is supported by the following cases: *Schnaderbeck v. Worth*, 8 Abb. Prac. 37; *Barhyte v. Hughes*, 33 Barb. 320; *Macdougall v. Maguire*, 35 Cal. 274, 95 Am. Dec. 98; *Anderson v. Hill*, 53 Barb. 238; *L. S. & M. S. Ry.*

Co. v. Van Auken, 1 Ind. App. 492, 27 N. E. 119; Terre Haute, etc., Co. v. Pierce, 95 Ind. 496; Keller v. B. F. G. Co., 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88; Shelly v. Vanarsdoll, 23 Ind. 543; Lovejoy v. Robinson, 8 Ind. 399; Ward v. Blackwood, 48 Ark. 396, 3 S. W. 624.

We are agreed, however, that the motion for new trial should have been granted. A large number of errors were specified as grounds of the motion; some relating to the admission of testimony, and others to the instructions. We find it necessary to consider only the assignments directed to the rejection of testimony offered by the defendant under his plea of mitigating circumstances. The defendant alleged, in substance, that he was the owner of the wheat referred to in the alleged slanderous charge; that he had employed the plaintiff to harvest and thresh it, and to deliver it to the elevator in the defendant's name; that the plaintiff sold about 300 bushels of it, and appropriated the proceeds to his own use—and averred that what the defendant said was in reference to this wheat; that he did accuse the plaintiff of taking said wheat, “and then and there said to the plaintiff, in substance, that said plaintiff had taken and sold said wheat;

* * * that, except as herein stated, the defendant neither said nor spoke anything to or about said plaintiff; that all that was at that time said or spoken by this defendant was true and was said or spoken without malice or intent to in any way wrong or injure the plaintiff.” Upon objection of plaintiff's counsel, the trial court excluded the evidence offered by the defendant (1) in support of his allegation of ownership of the wheat which was referred to in the conversation in which plaintiff claims the slander was published; and (2) in support of his allegation “that what was said or spoken was without malice, or intent to in any way wrong or injure the plaintiff.” This was prejudicial error. The plaintiff alleged in his complaint that the defendant had maliciously accused him of stealing his wheat; that is, of committing the crime of larceny. The defendant, although denying that he had spoken the slanderous words, alleged that whatever he said was without malice or intent to injure or wrong the plaintiff, and that it was said and spoken in reference to certain wheat which was in plaintiff's possession, but owned by the defendant, and which the plaintiff had in fact sold and appropriated. The answer does not state that the purpose of these allegations was to mitigate damages, or that they were offered as a plea in mitigation. In this respect the

answer is open to criticism. *Bennett v. Mathews*, 64 Barb. 410. Perhaps in other respects it cannot be approved as a model of pleading. See *Hatfield v. Lasher*, 17 Hun, 23; *Willover v. Hill*, 72 N. Y. 36; *Dolevin v. Wilder*, 34 How. Prac. 488. But no attack was made upon its sufficiency, and the record shows that it was treated both by court and counsel as a plea in mitigation. Under our statute, a defendant in an action for slander or libel may answer by way of justification and mitigation—either or both—or may plead mitigating circumstances in connection with a general denial, as was done in this case. Section 5289, Rev. Codes 1899, which was adopted in this jurisdiction from the Code of Civil Procedure of New York reads as follows: "In the actions mentioned in the last section [libel and slander], the defendant may in his answer allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages; and whether he proves the justification or not, he may give in evidence the mitigating circumstances." The following authorities may be cited in support of the construction which we have given to this section: *Bush v. Prosser*, 11 N. Y. 347; *Bennett v. Mathews*, 64 Barb. 410; *Van Benschoten v. Yaple*, 13 How. Prac. 97; *Heaton v. Wright*, 10 How. Prac. 79; *Dolevin v. Wilder*, 34 How. Prac. 488; *Warner v. Lockerby*, 31 Minn. 421, 18 N. W. 145, 821; *Coe v. Griggs*, 76 Mo. 619; *Bliss on Code Pl. section 360 et seq.*; 13 Enc. Pl. & Pr. 90, and cases cited. The contention of plaintiff's counsel—and it was adopted by the trial court—is that where the words of a slander or libel are unambiguous, accusing the plaintiff of the commission of a crime, and therefore actionable per se, as they were in this case, and are not justified or excused, "malice is conclusively presumed." And in this connection it is urged that "the issue raised by the general denial having been met and overcome by the plaintiff, i. e. proof being adduced of the speaking of the words charging him with being guilty of the crime of larceny, the law immediately raised three conclusive presumptions: (1) That the words were false; (2) that they were spoken maliciously; (3) that damages resulted to the plaintiff therefrom. There being no issue raised by the pleadings as to either justification or legal excuse, all the evidence offered by the defendant was incompetent, so far as the question of malice was concerned." The foregoing may be accepted as a correct general statement of the presumptions which follow proof of the publication of words action-

able per se which are not justified or excused. But the conclusion that, because in such cases it is said that malice is conclusively presumed, evidence upon the question of actual malice (that is, as to the motive or intent with which the publication was made) is incompetent, when offered under a sufficient answer, is entirely erroneous. The malice which by legal fiction is thus presumed to exist is known as "legal malice," as distinguished from actual or express malice, or malice in fact. *King v. Root*, 4 Wend. 114, 21 Am. Dec. 102; *King v. Patterson* (N. J. Err. & App.) 9 Atl. 705, 60 Am. Rep. 622. In many cases there may be no malice at all, and no intent to injure, or, at most, thoughtlessness or negligence. It is well settled that in such cases the absence of actual malice will not defeat the action, and the party injured may recover his actual damages. In other words, the absence of malice is never a complete defense. But where actual malice is charged in the complaint, and more than compensatory damages are claimed for the injury—and that is this case—the actual motive or intent with which the publication was made becomes an important, and indeed a vital fact, from which to determine the amount of damages to be awarded. The sole purpose of pleading and proving circumstances in mitigation is to place the jury in a position to determine whether the publication was with or without malice in fact, and, if with malice, its degree and character. This distinction is well stated in *Bennett v. Smith*, 23 Hun, 50: "In libel and slander the damages may embrace two items, namely, compensatory and punitive. The law implies damage from the injury done. If the defendant lacks a legal excuse for his libel of the plaintiff, the law presumes malice, and the defendant ought to respond to the full extent of the actual injury done the plaintiff; that is, compensatory damages should be given. But if, in addition to this malice which the law presumes, and which may be merely constructive and passive in fact, the jury should find that the defendant was actuated by active and vindictive malice, then they may give, in addition to the actual damages, punitive damages. These are not given as the actual due of the plaintiff, but awarded him, that the defendant may be punished, and a wholesome example afforded. It is true that in practice the jury do not distinguish between the damages that are compensatory and those that are punitive. No standard exists whereby to measure in money the equivalent for injured character, and hence the unjustified defendant is always in danger of being

mulcted in punitive damages. To avoid this, he is permitted to plead and prove matters in mitigation of damages. The strictly compensatory damages ought not to be mitigated, else the defendant might cast the consequences of his wrong upon the plaintiff. But the strictly punitive damages may be mitigated. These depend upon the malice of the defendant, and malice depends upon the motive with which the libel was published. If the motive was good, the malice for which the defendant must respond may be existent by operation of law, merely, and not by force of evil passions moving the defendant to wish and to do the plaintiff a wrong. The law, it must be borne in mind, presumes the existence, not the character, of the defendant's malice. That character, therefore, becomes a material fact in the case, and hence the defendant's motive or intent equally material." In the case just referred to, the defendant was charged with writing and publishing a libelous article. With a view to showing that he wrote the article with good motives, and in a belief of its truth, the defendant was asked this question by his counsel: "Why did you write it?" The trial court sustained an objection, and excluded the evidence. This was held to be error. The court said: "The question, 'Why did you write it?' called for the defendant's intent or motive. The defendant had the right to answer the question." Citing in support of its conclusion *Seymour v. Wilson*, 14 N. Y. 567; *Dutchess County, etc., Co. v. Hachfield*, 73 N. Y. 226; *Kerrains v. People*, 60 N. Y. 221, 19 Am. Rep. 158; *Cortland County v. Herkimer County*, 44 N. Y. 22; *Felder v. Darrin*, 50 N. Y. 437; *McKown v. Hunter*, 30 N. Y. 625. To which we may add *Marks v. Baker*, 28 Minn. 162, 9 N. W. 678; *Smith v. Higgins*, 16 Gray, 251; *Berkey v. Judd*, 22 Minn. 287. Indeed, it is well settled that, when intent is material to a fact in issue, a party may testify to it directly. *Pope v. Hart*, 35 Barb. 630; *Thurston v. Cornell*, 38 N. Y. 281; and cases above cited. So, also, for the purpose of enabling the jury to determine the character of the motive with which a defamatory publication is made, the defendant is permitted to allege and prove facts and circumstances known to and relied upon by him tending to show the absence of actual malice. Such facts are admitted to show that he did not act wantonly or rashly, and that he had probable cause for what he did or said and to rebut the inference of actual malice which might otherwise arise if the circumstances were not explained. For illustrative cases, see *Mayo v. Sample*, 18 Iowa, 306; *Wetherbee*

v. Marsh, 20 N. H. 565; 51 Am. Dec. 244; Shattuc v. McArthur (C. C.) 29 Fed. 136; Kidd v. Ward, 91 Iowa, 371, 59 N. W. 279; Hewitt v. Pioneer Press Co., 23 Minn. 178, 23 Am. Rep. 680; Willover v. Hill, 72 N. Y. 36; Weed v. Bibbins, 32 Barb. 315; Davis v. Griffith, 4 Gill & J. 342; Botelar v. Bell, 1 Md. 173. The evidence offered by the defendant under his plea in mitigation, and excluded by the trial court, included, among others, the following questions put to him by his counsel: "Did you say what you said at the time out of any malice upon your part toward the plaintiff?" "What, Mr. Jones, led you to say what you did say to the plaintiff concerning the taking of the wheat?" In addition, all evidence offered by the defendant to show the facts and circumstances which were within his knowledge when he spoke the slanderous words, relating to his ownership of the wheat, and its possession and appropriation by the plaintiff, was excluded. This was error of a highly prejudicial character. As we have already seen, the defendant had a right to testify directly to his intent and motive; and he also had a right to inform the jury as to the facts and circumstances which were pleaded, and were known to him when he uttered the slander. This evidence was of the highest importance. "In such cases it is often important that the jury should have some information of the transaction to which the words refer, in order to understand correctly their true import and meaning, and the design with which they were spoken. The defendant may, through ignorance or excitement, misapprehend the plaintiff's conduct, or use inappropriate language and epithets in the expression of his indignation or resentment; and yet that conduct may have been wholly unwarranted, or extremely injurious or provoking. The aggravation of a fraud or a trespass into a felony, whether from ignorance or exasperation, surely stands upon a different footing, in regard to the quantum of damages, from a sheer fabrication. Thus, if a party should obtain the money of another by a fraudulent contrivance or dishonest breach of trust, or his property by open violence under a false claim of title, and the party injured in speaking of the transaction, should designate it, in the former case as a theft, or in the latter as a robbery, a recovery of heavy damages in an action of slander would not be so much for actual defamation as for inaccurate phraseology. And if a plaintiff without moral guilt, but to disport himself with the fears or feelings of the defendant, has mislead or provoked him to the use of defamatory words, this

should be made known to the jury; otherwise the plaintiff, to a greater or less extent, would recover damages for his own misbehavior." *Bourland v. Eidson*, 8 Grat. 27. In this case punitive damages were claimed by the plaintiff. The jury was instructed that punitive damages might be awarded, and they were awarded in the verdict returned. Actual malice thus became a material and vital issue, and the defendant should have been permitted to offer evidence upon it under his plea in mitigation of damages.

The remaining assignments need not be referred to. Those already considered are fatal. The district court is directed to vacate the order and judgment appealed from, and to enter an order granting a new trial. All concur.

(100 N. W. 705.)

CELESTIA E. VAN DUSEN v. BENJAMIN F. BIGELOW.

Opinion filed July 5, 1904.

Agent Purchasing Principal's Land Must Disclose All Facts Regarding Its Value, or Conveyance Is Voidable.

1. Where a party accepts an agency to take charge of a house and lot belonging to his principal, collects the rents, pays taxes and sees to repairs, and gives advice as to the value of the principal's unimproved farm lands, a fiduciary and confidential relation is thereby created between them in regard to everything connected with such property; and, if the agent purchases such farm lands for himself and in his own name, he is bound to make full disclosure of all facts bearing on the value of such lands material for the principal to know in order to act intelligently, and if the agent conceals such facts the conveyance is voidable at the principal's election.

Appeal from District Court, Stutsman county, *Lauder*, J.

Action by Celestia E. Van Dusen against Benjamin F. Bigelow. Judgment for plaintiff, and defendant appeals.

Affirmed.

John Knauf and *Oscar J. Seiler*, for appellant.

Power to superintend, make contracts, release and bind as to personal and real property, does not constitute agency to sell real estate. Authority to sell real estate must be clear, concise and express. *Billings v. Morrow*, 7 Cal. 172; *Lord et al. v. Sherman*, 2 Cal. 498; *Jones v. Marks et al.*, 47 Cal. 242; *De Rutte v. Muldrow*,

16 Cal. 505; Treat et al. v. De Celis, 41 Cal. 202; Hay v. Mayer, 34 Am. Dec. 453.

Plaintiff having testified that authority to sell was in writing, she must so establish it as alleged. 1 Am. & Eng. Enc. Law, (2d Ed.) 968; Montgomery v. P. C. L. Bureau, 28 Am. St. Rep. 123; Bush v. Wilcox, 47 N. W. 328; Kelly v. Estate of Strong, 31 N. W. 721.

Such proof must be clear and succinct. Hodge v. Combs, 1 Black. 192; L. R. Co. v. Gilmore, 69 Ala. 534; Taylor v. Merrill, 55 Ill. 52; Proudfoot v. Wightman, 78 Ill. 553; Hood v. Adams, 128 Mass. 207.

Agency to sell is a contract, to constitute which, the principal must appoint and the agent accept. Harman v. Niagara Falls Ins. Co., 100 N. Y. 411, 3 N. E. 341; Anderson v. State, 22 Ohio St. 305; Mechem on Agency, 1; Mechem on Agency, section 108; First Nat. Bank of Albia v. Free, 24 N. W. 566; Collor v. Ford, 45 Iowa 331; Cameron v. Seamon; 69 N. Y. 396; Marks v. Sullivan, 8 Utah, 406.

Agency to sell real estate must be in writing. No such writing was shown. Subdiv. 5, section 3887, Rev. Codes, 1899; subdiv. 5, section 4314, Rev. Codes, 1899; section 3531, Rev. Codes, 1899; Reese v. Medlock, 84 Am. Dec. 611; Mechem on Agency, section 103.

E. M. Sanford, W. A. Martin and F. Baldwin, for respondent.

An agent cannot purchase property on his own account, when he has a duty to perform, in relation thereto inconsistent with his character as such purchaser. Jansen et al. v. Williams, 55 N. W. 279; Casy v. Casy, 14 Ill. 112; 1 Waits Actions and Defenses, 246.

MORGAN, J. This equitable action is brought for a reconveyance of certain real estate which was conveyed to the defendant by the plaintiff while defendant is alleged to have been plaintiff's agent for the sale of such real estate and failed to communicate to plaintiff that he had received an offer for said land for a much larger sum than that for which the plaintiff sold the same to the defendant. The substance of the allegations of the complaint is that defendant took advantage of the confidence reposed in him by plaintiff as her agent and purchased the land himself, under fraudulent concealment of facts, for a sum much less than that which he could have sold it for, and much less than the actual value of the land. In

the complaint plaintiff offers to return all money and the security received by her from the defendant under such conveyance. The defendant by answer denies that he was plaintiff's agent for the sale of such land, and denies that he was offered a larger sum for such land than he paid for it, and denies that he fraudulently concealed any facts from plaintiff, and denies that the land was worth any more than he paid for the same. Whether defendant was plaintiff's agent for the sale of her lands, and whether defendant had an offer for the land of \$1,400 when he purchased it for himself for \$900, were the issues that were contested at the trial. The trial court found against the defendant on both these issues, and ordered that a reconveyance be made upon restoration by plaintiff of all she had received under the sale. The defendant appeals from a judgment rendered on such findings, and requests a review of the entire record under section 5630, Rev. Codes, 1899.

It is urged that the judgment is not sustained by any evidence that defendant was plaintiff's agent for the sale of the land. This contention is based on the fact that secondary evidence was received of the contents of Exhibit A, which was found missing from plaintiff's deposition taken at Chicago, to which said exhibit should have been attached. The notary taking the deposition certifies that Exhibit A was attached, but upon being opened it was not attached nor inclosed in the envelope containing the deposition. For the purposes of this case it will be conceded that all of plaintiff's evidence pertaining to the contents of said Exhibit A, and all secondary evidence given as to its contents, would be excluded on trials not under section 5630, Rev. Codes 1899. The evidence will not, therefore, be considered on this appeal. Without such evidence we think the record contains evidence sufficient to warrant a recovery by the plaintiff. There is evidence in the record that is not disputed that, for nearly four years prior to the sale of the land to the defendant by the plaintiff, defendant had been the general agent of the plaintiff, for taking care of her property in the city of Jamestown. He had charge of renting and repairing her house in said city, and collected the rent for the same, and paid the taxes on this house and lot, as well as on the land that is the subject of this action. Plaintiff and defendant had corresponded in reference to the sale of said land and its value. Her testimony is that she relied on him as to the value of said land, and made no inquiries elsewhere as to its value. On June 19, 1901, the defendant wrote her that he considered this

land worth \$4 per acre, and further said, "It would be well for you to name the amount you could sell for, and a purchaser might be found." Prior to this, and on December 21, 1899, he wrote her as follows: "As to price of house and land, would say if you were going to trade I would think about \$1,600 for house and quarter section of land. If you could get cash you might take less. Harvey sold his quarter for \$650, crop payment plan." It is also shown by uncontradicted evidence that he had full charge of her city property, and that she left matters to his judgment, and relied on him to protect her interests as to repairs and collections of rents, and in one letter said, "It seems as though it was not best to let them get so far behind, but you, of course, being there, understand the circumstances best." She further testified that she relied on him as her agent to fix the selling price of her land, and that she did not know the value of the land in March, 1902, when she sold it to the defendant. On March 7, 1902, defendant wrote her on other matters, and at the close of the letter asked her: "Would you accept \$900 for the south half of section six; \$500 cash, balance in two years at six per cent interest? Please let me know." She answered that she would accept such an offer. She conveyed the land to him in March, 1902, and he paid her \$500 cash and gave her a mortgage on the land for \$400. This action was commenced September 10, 1902. The trial court found as a fact that defendant was plaintiff's agent for the sale of this land on March 7, 1902, and for a long time prior thereto.

That he was in correspondence with her about the sale and value of this land, and advised her concerning the same, is undisputed, and is shown by his own letters outside of Exhibit A. That he was her sole agent to care for her other property is also beyond dispute. That he alone looked after all her interests in Jamestown and vicinity is also beyond question. Defendant was her agent as to certain matters, and as to those matters he had her confidence, and as to those matters she relied on his judgment. Whether he was her authorized agent to sell the land—that is, whether he was such agent in respect to the sale of the land that his contract for the sale of the land would bind her—need not be determined. We think that he was her agent in respect to the land, and, as such agent, he was under obligations to advise her fully as to all facts within his knowledge bearing upon the value of the land, and upon all matters in reference to the sale thereof. Defendant had been her agent for

several years. We think the evidence in the record, outside of Exhibit A, is sufficient to show that he was her agent to sell this land. That such agency to sell the land is not shown by explicit writing is entirely immaterial in this kind of action. It is not a case of enforcing a contract against a principal made by an agent with a third person. In a case like the one at bar the agency may be shown by parol, as there is no statutory provision that requires an agency to negotiate for a sale to be in writing. It is the confidential relation existing between them, followed by concealment of facts, that is the gist of the cause of action. He was her agent for specific purposes connected with this land and with her other property. By virtue of such agency he became acquainted with the value of the land, and knew that she knew nothing of its value, and that she was relying wholly upon him. It is the existence of such confidence, arising out of their business relations as to a specific agency, that gives rise to a duty on his part to disclose all facts known to him in reference to the value of the land if he chose to buy it himself. It is not claimed that he made false or fraudulent statements. It is claimed that he should have disclosed that he had an offer of \$1,400 for the land when he bought it for \$900, and that this was a fraudulent concealment. The relations existing between them, as shown by the evidence referred to, was such as demanded frank and full disclosures of all facts known to him bearing on the value of the land before he could become a purchaser of the same, although avowedly made for himself. In *Norris v. Tayloe*, 49 Ill. 17, 95 Am. Dec. 568, it was said: "Where a party accepts the position of an agent to take charge of the lands of his principal, collect the rents and royalty, and pay taxes, a fiduciary and confidential relation is thereby created in regard to everything relating to such lands, and in treating with his principal for the property the agent is bound to make the fullest disclosures of all matters connected therewith, within his knowledge, which it is important for his principal to know in order to treat understandingly." In *Davis v. Hamlin*, 108 Ill. 39, 48 Am. Rep. 541, it was said: "It is contended by appellant's counsel that the rule we apply, which holds an agent to be a trustee for his principal, has no application to the case at bar, because Davis was not an agent to obtain a renewal of the lease, and was not charged with any duty in regard thereto; that his was but a specific employment to engage amusements for the theater, and that he was agent only within the scope of that employment; that

Hamlin, having a lease which would expire April 16, 1883, had no right or interest in the property thereafter; and that Davis, in negotiating the lease, did not deal with any property wherein Hamlin had any interest, and that such property was not the subject-matter of any trust between them. Although there was no right of renewal of the lease in the tenant, he had a reasonable expectation of its renewal which courts of equity have recognized as an interest of value, secretly to interfere with which and disappoint, by an agent in the management of the lessee's business, we regard as inconsistent with the fidelity which the agent owes to the business of his principal.

* * * In applying the rule, it is the nature of the relation which is to be regarded, and not the designation of the one filling the relation." In *Cook v. Berlin Woolen Mills Co.*, 43 Wis. 433, the court said: "But whatever may be the nature of the agency, a court of equity regards every purchase by an agent from his principal with jealous scrutiny, to see that the agent takes no advantage from the confidence of his principal; with jealousy almost invincible, as Judge Story calls it; and there is a class of agents who are held to a very strict rule, a good deal like the rule which courts of equity once generally applied to trustees, and some few courts still apply. When the nature of the agency has given the agent control in the management of the principal's property, and peculiar opportunity of knowing its condition and value, a purchase of it by the agent will be avoided at the suit of the principal, unless the agent make it affirmatively appear that the transaction was fair, and that he imparted to the principal all his information concerning the property, and acted throughout *uberrima fide*." *Pomeroy on Equity Jurisprudence* (volume 2, section 959) lays down the rule as follows: "Any unfairness, any underhanded dealing, any use of knowledge not communicated to the principal, any lack of the perfect good faith which equity requires, renders the transaction voidable, so that it will be set aside at the option of the principal. If, on the other hand, the agent imparted all his own knowledge concerning the matter, and advised his principal with candor and disinterestedness as though he himself were a stranger to the bargain, and paid a fair price, and the principal on his side acted with full knowledge of the subject-matter of the transaction and of the person with whom he was dealing, and gave a full and free consent—if all these are affirmatively proved, the presumption is overcome and the transaction is valid." See, also, *Ingle v. Hartman*, 37 Iowa, 274;

Rubidoex v. Parks, 48 Cal. 215; Cotton v. Holliday, 59 Ill. 176; Jackson v. Pleasonton (Va.) 29 S. E. 680; Andrews' Am. Law, p. 813, and cases cited; Mechem on Agency, section 466, and cases cited; 1 Am. & Eng. Enc. Law, p. 1081, and cases cited; Wharton on Agency, section 235, and cases cited; Ruckman v. Bergholz, 37 N. J. Law, 437; Jansen v. Williams (Neb.) 55 N. W. 279, 20 L. R. A. 207; Casey v. Casey, 14 Ill. 112; Stewart v. Gilruth, 8 S. D. 181, 65 N. W. 1065.

A duty of full disclosure of all material facts within his knowledge bearing on the value of the land rested upon the defendant, and, unless he made such disclosures before himself becoming a purchaser, the conveyance becomes voidable upon plaintiff's election to so consider it. The concealment charged against the defendant is as to the value of the land. It is insisted that defendant knew its value to have been greater than that offered, and the fact claimed, that he was offered \$500 more than he bought it for, is cited as conclusive evidence that he failed to disclose a material fact bearing upon its value. The trial court found that such an offer was made, and further found that the value of the land, when conveyed to defendant by plaintiff for a consideration of \$900, was \$1,920. The evidence as to the value of the land and as to the making of an offer of \$1,400 for the land is conflicting. On reading the entire record, we find that defendant's testimony upon three disputed questions is contradicted by three witnesses, one alone testifying upon one disputed question. There is no more reason for finding that defendant is telling the truth upon the question of the offer to him for the land than as to the other disputed questions. To reverse the judgment and find for the defendant would be finding that the plaintiff's witnesses are each mistaken upon material matters testified to, concerning which they have no interest. Defendant's interest in the result is apparent. The trial court saw and heard the witnesses testify, and had superior advantages for determining as to the credibility of the witnesses. The finding that an offer of \$1,400 had been made to the defendant, as agent for the plaintiff, when he commenced negotiating for the purchase of the land for himself on March 7, 1902, is justified by the evidence.

Before the trial commenced, the defendant demanded that the issues be submitted to a jury for determination, and now claims that he was entitled to a jury trial as a matter of right. His contention is that the action is one for damages, and that all issues "of

fact in an action for the recovery of money only" must be submitted to a jury, under section 5420, Rev. Codes 1899, if demanded. We do not agree with appellant that the action is one for the recovery of money only. The relief demanded in the complaint is that the defendant "be required to reconvey said land * * * to plaintiff, * * * and that in lieu thereof that defendant have judgment for \$1,020," etc. The primary relief asked is equitable in its nature, and does not pertain to damages. The damages are asked as alternative relief to meet a possible state of facts where the defendant had placed it beyond his power to reconvey. A court of equity will always award damages in case equitable relief cannot be given, or has become impracticable for any reason. 1 Pom. Eq. Jur. section 237. The action being not one for the recovery of money only, the defendant was not entitled to a trial to a jury as a matter of right.

Objections were also made on which was based a motion to suppress the deposition of the plaintiff. Such objections relate to the alleged fact that the notary before whom the deposition was taken acted as attorney for the plaintiff. The record fails to show any misconduct on his part. The defendant was represented by his attorney at the taking of the deposition, and defendant's interests were protected in every way.

The judgment is therefore affirmed. All concur.
(100 N. W. 723.)

W. C. CRUSER AND W. J. BAKER V. ERASTUS A. WILLIAMS.

Opinion filed July 12, 1904

Taxation — Jurisdiction Rests Upon the Fact, Not the Proof of Service of Process.

1. Section 4 of chapter 67, p. 78, Laws 1897, which is an act to enforce the payment of real estate taxes through the medium of a judgment and a sale thereunder, requires the publication of a notice and list and the filing of an affidavit of publication with the clerk. It is *held*, on an attack upon the validity of a tax judgment: (1) That the evidence is not sufficient to overcome the presumption that the affidavit of publication was filed; and (2) that jurisdiction to enter the judgment was given by the fact of publication, and not by the filing of the affidavit. *Emmons County v. Thompson*, 84 N. W. 385, 9 N. D. 605, followed.

Until Redemption, Certificate of Sale Is Evidence of Lien Only.

2. All sales under the above chapter are subject to redemption, and until the right of redemption is eliminated the sheriff's certificate of sale is evidence of a lien only.

Notice of Expiration of Period of Redemption — Burden of Proof.

3. The redemption period does not terminate, or the certificate of sale mature, or title pass, until the statutory notice of the expiration of redemption has been given, and proof thereof filed; and the burden of proving such service and filing is upon the person asserting title thereunder.

Appeal from District Court, Emmons county; *Winchester, J.*

Action by W. C. Cruser and W. J. Baker against Erastus A. Williams. Judgment for plaintiffs, and defendant appeals.

Reversed.

Herried & Williamson and *J. H. Wishek*, for appellant.

The holder of a certificate of sale under the Woods law has not the fee simple title until it is perfected by serving notice of expiration of period of redemption, and filing proof of such service with the clerk. No affidavit of service was filed and there was no record of such filing. The clerk, as a court, was exercising special statutory powers in contravention of the common law in a summary way, and nothing will be presumed in favor of the judgment, but the record must show jurisdiction. *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959; *Thatcher v. Powell*, 6 Wheat. 119, 5 L. Ed. 221; 12 Am. & Eng. Enc. Law (1st Ed.) 271-277; *Emmons County v. Lands of First Nat. Bank of Bismarck*, 9 N. D. 583, 84 N. W. 379.

Where want of jurisdiction exists no statute of limitations will run. *Roberts v. First National Bank*, 8 N. D. 504, 79 N. W. 1049.

Possession of land stops the running of the statute of limitations. *Baker v. Kelly*, 11 Minn. 480; *Cooley on Con. Lim.* 455.

Shellenberger & Bryan and *George W. Lynn*, for respondents.

It is incumbent upon appellant to show the giving and filing of the notice of expiration of redemption. No notice of expiration of the right of redemption was given, and consequently no proof of the service thereof is required to be given, where the land is bid off by, or in the name of, the state. *State of Minnesota ex rel Western Land Association of Minnesota v. Smith, Co. Auditor*, 36 Minn. 456, 32 N. W. 174.

YOUNG, C. J. The plaintiffs bring this action to determine adverse claims to 160 acres of land situated in Emmons county. Their claim of title rests upon a sheriff's certificate issued upon a sale under a tax judgment which was entered pursuant to the provisions of chapter 67, p. 76, Laws 1897. The title of the defendant comes directly from the United States government, and it is conceded that he is the owner of the land, unless his title was divested by the tax judgment and sale. The trial court found for the plaintiffs upon all of the issues, and entered judgment sustaining their alleged title and right of possession. The defendant appeals from the judgment, and demands a review of the entire case in this court.

The appellant urges two grounds for reversal: (1) That the tax judgment was entered without jurisdiction, and is void; and (2) that, even if the judgment is valid, title did not pass to plaintiffs, for the reason that notice of expiration of redemption was not served and filed.

In support of their objection to the validity of the judgment it is claimed that no affidavit of publication of the list was filed with the clerk of the district court, as provided for in section 4 of the above act. This section, in addition to requiring the publication of the list in a newspaper designated by the county commissioners, provides that the owner, publisher, manager or foreman of the same "shall make and file with the clerk of the district court an affidavit of such publication." The objection that the affidavit of publication was not filed has no sufficient foundation in fact. Plaintiffs offered the certificate of sale in evidence. Section 15 provides that: "The certificate shall in all cases be prima facie evidence that all the requirements of law with respect to the sale have been duly complied with, and no sale shall be set aside or held invalid unless the party objecting to the same shall prove, either that the court rendering the judgment pursuant to which the sale was made had not jurisdiction to render the judgment, or, that after the judgment and before the sale, such judgment had been satisfied." Presumptively, then, the judgment is valid, and the burden of sustaining an attack upon the jurisdiction is upon the plaintiffs. In this they have failed. The only evidence offered for that purpose was that of the clerk of the district court, who testified that he had examined his files, and could not find the affidavit or any record of its filing. He did not state that it had not been filed; neither did he state that it was not then on

file. This testimony is entirely too indefinite to overcome the presumption that all of the requirements of the law were complied with and that the affidavit was filed. But were the fact otherwise, it would not alter our conclusion as to the validity of the judgment, for there is neither pretense nor proof that the list was not in fact published; and this court has held, in construing this particular section, that it is the fact of publication, and not the proof of it, which gives jurisdiction. *Emmons County v. Thompson*, 9 N. D. 598, 605, 84 N. W. 385, and cases cited. See, also, *Bennett v. Blatz*, 44 Minn. 56, 46 N. W. 319; *Kipp v. Fullerton*, 4 Minn. 473 (Gil. 366); *Com'rs v. Morrison*, 22 Minn. 178; *Hoyt v. Clark*, 64 Minn. 139; 66 N. W. 262; *Frisk v. Reigelman*, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198.

The second ground urged for reversal is meritorious, and must be sustained. In our opinion, the evidence wholly failed to show that the defendant's title has been divested. The only evidence offered by the plaintiffs to establish their title consists of (1) a sheriff's certificate of sale issued to the county, and (2) the auditor's assignment of the same to them. It appears from the recitals in these instruments that a judgment for delinquent taxes was entered against the land in question on October 4, 1897; that at the sale thereunder, which occurred on December 6, 1897, the land was bid in by the county for want of individual purchasers; and that on July 8, 1899, which was less than two years after the sale, the county assigned its interest to the plaintiffs, who paid the amount due on the certificate and all subsequent taxes, penalty and interest. These facts do not show that the plaintiffs have acquired anything more than a mere lien. All sales under chapter 67, p. 76, Laws 1897, are subject to redemption, whether to the county or to individual purchasers. Section 20 gives to any person having an estate or interest in the property a full period of two years in which to redeem. But time is only one of the elements necessary to eliminate the right of redemption and terminate the redemption period. Service and filing of the notice of expiration is also essential. Section 14 requires notice of the expiration and maturity of the certificate to be given by "the holder of any certificate," and declares that "the fee simple of any piece or parcel of land named in any certificate shall not vest in the holder thereof until the notice provided for herein is given and due proof thereof filed with the clerk of the district court." We have just held, in the

case of *Darling and Angell v. Purcell*, 100 N. W. 726, 13 N. D. 288, that the right of redemption under this statute is not eliminated, and the time for redemption does not expire, or the certificate mature, until the notice of expiration has been served and filed. In this case no proof of the service and the filing of the notice of expiration of the redemption period was offered. Standing alone, the certificate is evidence merely of a lien, and it is only when accompanied by proof of service and filing of the notice of expiration of redemption that it becomes evidence of title, and the burden is upon the person asserting title under the certificate to prove that such notice has been duly served and filed. *Mueller v. Jackson*, 39 Minn. 431, 40 N. W. 565; *Nelson v. Central Land Company*, 35 Minn. 408, 29 N. W. 121. The plaintiffs have proved only a lien, and the court was in error in adjudging that they have title.

The trial court is accordingly directed to set aside the judgment appealed from, and to enter judgment confirming the plaintiff's lien. Appellant will recover costs in both courts. All concur.

(100 N. W. 721.)

CHARLES W. DARLING AND E. D. ANGELL V. W. E. PURCELL, E. A. DIVET AND J. A. SLATTERY.

Opinion filed July 12, 1904.

Resolution Designating Newspaper Under "Woods Law" Sufficient — Absence of County Seal Does Not Invalidate.

1. Section 4, c. 67, p. 78, Laws 1897, relating to the enforcement of real estate taxes by judgment and sale, requires the county auditor to file with the clerk of the district court a certified copy of the resolution of the county commissioners designating the newspaper in which the notice and list is to be published, but prescribes no form of certificate, and does not expressly require that it shall be under seal. It is *held* that the certified copy set out in the opinion was sufficient, and that the absence of the county seal does not render it invalid.

Deviation in Published List, as to Phraseology and Arrangement, Not Fatal.

2. Deviations in the published list from the list filed in matters of phraseology and arrangement, which do not affect the substance, and are not misleading as to the facts which the statute requires to be stated in the list, are not fatal to its validity.

Error in Computation of Interest and Penalty Does Not Affect Judgment.

3. This act (laws 1897, p. 79, c. 67, section 6) makes it the duty of the clerk, in default of answer, to enter judgment for the amount

of the tax, penalty and interest stated in the list, and the fact that the county treasurer made an error in computing and stating the amount of interest and penalty did not affect the jurisdiction of the court to enter judgment for the amount stated.

Sale for Greater Sum Than Is Due Does Not Invalidate.

4. The fact that a sale under a valid judgment is made for a greater amount than is due does not render it invalid, and is not one of the grounds upon which a sale may be set aside.

Certificate of Sale the Only Muniment of Title, Which Is Complete at End of Redemption Period.

5. All sales under chapter 67, p. 76, Laws 1897, are subject to redemption. The certificate of sale is the only muniment of title issued by the county, and title passes by operation of law when the redemption period has expired, and not before.

Notice of Its Expiration Essential to Terminate Redemption Period.

6. Service of notice of expiration of redemption, and filing of proof thereof with the clerk of the district court, is essential to terminate the redemption period. The holder of a certificate may, by timely service, limit the redemption period to two years, but the effect of delay in such service and filing is to postpone the expiration of the redemption period and the maturity of the certificate; and until service is made and proof filed the certificate, whether held by an individual or by the county, does not ripen into title.

Assignment of Certificate of Sale by County Is Effective When Required Payment Therefor Is Made.

7. Section 19 of this act (Laws 1897, p. 86, c. 67) gives to the county treasurer authority to assign certificates held by the county upon payment of the amount due thereon, with all subsequent taxes, penalties and interest. It is not essential to the validity of an assignment executed under this power that the payment of the amount due shall be completed when it is delivered. When the required payments are in fact made, although at a later date, the assignment becomes effective, and is valid.

Appeal from District Court, Sargent county; *Cowan, J.*

Action by Charles W. Darling and E. D. Angell against W. E. Purcell and others. Judgment for defendants, and plaintiffs appeal. Reversed.

J. E. Robinson, Newman, Spalding & Stambaugh and Wicks, Paige & Lamb, for appellants.

The tax judgment is void.

Certificate to copy of resolution designating paper, does not show that it is a copy, and is fatally defective. *Sykes v. Beck*, 12 N. D. 242, 96 N. W. 844.

Certified copy of such paper must be filed with the clerk of court. *Cass County v. Security Improvement Co.*, 7 N. D. 528, 75 N. W. 775.

The word "seal" within a scroll is not a sufficient representation of the county seal, or official seal of the county auditor. *Hiles v. Atlee*, 62 N. W. 940.

Advertisement must correctly state the amount of tax. *Cooley on Taxation*, 935. A tax judgment for an excessive amount is void. *Coombs v. Goff*, 20 N. E. 9; *Fuller v. Shedd*, 44 N. E. 286.

The sale is void; it was made on a judgment that included an illegal item of sheriff's fees. *Wilson v. Cass County*, 8 N. D. 456, 79 N. W. 985.

Where the statute provides a particular form of tax certificate or tax deed, it must be strictly pursued, or such deed or certificate will be void. *Hubbell v. Campbell*, 56 Cal. 527; *Grimm v. O'Connell*, 54 Cal. 522; *Lain v. Cook*, 15 Wis. 446; *Haller v. Blaco*, 4 N. W. 362; *Thompson v. Merriam*, 20 N. W. 24.

The certificate described only one tract sold for \$22,344.58. It should state the amount that each tract was sold for. *Laws of 1897*, page 84. The assignment of the tax certificate is void, as it was made more than two years from date of sale. *Laws of 1899*, page 85. The tax deed is void on its face. The tax deed is signed by the county auditor without any designation of his official capacity. Such deed is void. 2 *Blackwell on Tax Titles*, sections 865, 870; *Spear v. Ditty*, 9 Vt. 282; *Isaac v. Shattuck*, 12 Vt. 668.

Where the statute does not prescribe the form of tax deed, the conditions from which the power arises must be recited therein. *Cooley on Taxation*, (3d Ed.) 997; *Cogel v. Ralph*, 24 Minn. 198; *Bonham v. Weymouth, et al.*, 38 N. W. 805; *Call v. Dearborn*, 21 Wis. 510; *Baldwin v. Merriam*, 20 N. W. 250; *Ludden v. Hansen*, 22 N. W. 766; *West v. St. Paul & N. P. Ry. Co.*, 41 N. W. 1031; *Gilfillan v. Chatterton*, 37 N. W. 583.

The tax title is void as no redemption notice was served. *Cooley on Taxation* (3d Ed.) 1034; *Smith v. Smith*, 32 N. W. 174.

Statutes of limitation, in tax matters, have no force against jurisdictional defects, such as appear in this case. *Roberts v. First National Bank of Fargo*, 8 N. D. 504, 79 N. W. 1049; *Hegar*

v. De Groat, 3 N. D. 354, 56 N. W. 150. Such a statute merely fixes a time when a bad title or a void procedure ripens into a good title. It does not give repose to possession. Cooley on Taxation (2d Ed.) 555, 567; Cooley's Con. Lim. 447, 449; Grosbeck v. Seeley, 13 Mich. 329; Baker v. Kelly, 11 Minn. 480; Conway v. Cable, 37 Ill. 82; Waln v. Shearman, 8 Sargent & Rawley, 357; Kipp v. Johnson, 31 Minn. 360; Farrar v. Clark, 85 Ind. 449; Gave v. Root, 93 Ind. 256; Case v. Dean, 16 Mich. 12; Quinlan v. Rogers, 12 Mich. 168; Baldwin v. Merriam, 20 N. W. 250; Feller v. Clark, 31 N. W. 175; Blackwell on Tax Titles (5th Ed.) 895, 897, 944, 945; Cooley on Con. Lim. (6th Ed.) 449; Cooley on Taxation (2d Ed.) 557.

A strict construction is always given to statutory proceedings to divest a citizen of his property for a nominal consideration. Farrington v. N. E. Investment Co., 1 N. D. 102, 45 N. W. 191; Power v. Bowdle, 3 N. D. 107, 54 N. W. 404; Power v. Larabee, 2 N. D. 141, 49 N. W. 724; O'Neill v. Tyler, 3 N. D. 47, 53 N. W. 434; Swenson v. Greenland, 4 N. D. 532, 62 N. W. 603; Roberts v. First Nat. Bank of Fargo, 8 N. D. 504, 79 N. W. 1049; Lee v. Crawford, 10 N. D. 482, 88 N. W. 97; Security Imp. Co. v. Cass County, 9 N. D. 553, 84 N. W. 477; Sweigle v. Gates, 9 N. D. 538, 84 N. W. 481; Dever v. Cornwell, 10 N. D. 123, 86 N. W. 227; Hegar v. De Groat, 3 N. D. 354, 56 N. W. 150.

A tax title is purely technical as distinguished from a meritorious one, and depends for its validity on a strict compliance with the statute. Black on Tax Titles, section 409; Kern v. Clarke, 60 N. W. 809; Bendixon v. Fenton, 31 N. W. 685; Haller v. Blaco, 4 N. W. 362; Hiles v. Atlee, 62 N. W. 940; Salmer v. Lathrop, 72 N. W. 570.

Purcell, Bradley & Divet, for respondents.

The "Woods Law," so called, is constitutional. It was adopted from Minnesota and has been there sustained. Wells County v. McHenry, 7 N. D. 246, 74 N. W. 241; Emmons Co. v. Lands of First Nat. Bank of Bismarck, 9 N. D. 583; 84 N. W. 379; Emmons Co. v. Thompson, 9 N. D. 598, 84 N. W. 385; State v. Lands of Redwood County, 42 N. W. 473; Winona and St. Peter Land Co. v. State of Minnesota, 159 U. S. 526, 16 Sup. Ct. Rep. 83; State v. Weyerhauser, 71 N. W. 265.

The omission of the county seal from the certified copy of the resolution designating the delinquent tax list was not fatal. Paine

v. French, 4 Ohio 318; Fund Commissioners v. Glass et al. 15 Ohio 542; Ashley v. Wright, 19 Ohio St. 291; Frantum v. Buffman, 58 Mass. 260.

The auditor is authorized to certify, but no form of certificate is prescribed. The law does not declare that the certificate must be under seal. Where the law declares that certain things must be done in a certain manner, it is presumed to have declared all things that are to be so done. See Maxwell v. Hartman, 8 N. W. 103, Baze v. Arper, 6 Minn. 220; Thomas v. Morgan, 6 Minn. 292, Gil. 199.

The tax list was properly published. It is claimed that the list as published differs from the one filed, in that the column for the town and range is omitted in the printed list, and the number of the town and range set opposite each description. This raises the question of cross line description, that is, setting down the town and range at the head of the column instead of repeating them in each description. This method is upheld. McQuaide v. Jeffrey, 50 N. W. 233.

The published list need not be an exact copy of the filed list to confer jurisdiction. Choteau v. Hunt, 46 N. W. 341; McQuaide v. Jaffrey, supra; Sperry v. Goodwin, 46 N. W. 328; Lane v. Innes, 45 N. W. 4; Sharp v. Daugney, 33 Cal. 505.

That the judgment is for an excessive amount does not invalidate it. A judgment is not liable to collateral attack, because of a mistake in ascertaining an amount to be entered therein, or other irregularity. McCulloch v. Estes, 25 Pac. 724; Gregory v. Bouvier, 19 Pac. 232; Griswold v. Stoten, 84 Amer. Dec. 409; Hilton v. Dumphey, 71 N. W. 527.

The sale is not subject to collateral attack. Jaggard on Taxation, section 100; Van Vleet on Collateral Attack, sections 787-8; Hilton v. Dumphy, supra.

No notice of expiration of the period of redemption was required to be made by the county. The provisions for giving such notice apply only to individuals. State ex rel v. Smith, 32 N. W. 174.

This action is barred by the statute of limitations found in the Woods Act, section 15. The exceptions to such statutes are found in Roberts v. First National Bank, 8 N. D. 504, 79 N. W. 1049. See, also, Oconto Co. v. Jerrard, 46 Wis. 307; Geekie v. Kirby Carpenter Co., 106 U. S. 379, 27 L. Ed. 157; Terry v. Anderson, 95 U. S. 635, 24 L. Ed. 365; Williams v. Supervisors, 122 U. S.

154, 30 L. Ed. 1088; *In re Brown*, 135 U. S. 662, 34 L. Ed. 316, 10 Sup. Ct. Rep. 972; *Bronson v. St. Croix Lbr. Co.* 46 N. W. 570; *Coulter v. Stafford*, 48 Fed. 266; *Imp. Co. v. Bardon*, 45 Fed. 706; *Ensign v. Barse*, 14 N. E. 400, 15 N. E. 401; *Ostrander v. Darling*, 27 N. E. 353; *Freeman v. Thayer*, 33 Me. 83; *Pillow v. Roberts*, 13 How. 472, 14 L. Ed. 228; *Turner v. New York*, 106 U. S. 90, 42 L. Ed. 392, 18 Sup. Ct. Rep. 38; *Dunda v. Harlan*, 25 Pac. 883; *Martin v. Garrett*, 30 Pac. 168; *Dalrymple v. City of Milwaukee*, 10 N. W. 141; *Manseau v. Edwards*, 10 N. W. 554; *Hotson v. Wetherby*, 60 N. W. 423; *Dupen v. Wetherby*, 48 N. W. 378; *Wisconsin Cent. Ry. Co. v. Lincoln*, 30 N. W. 619; *Sherry v. Gilmore*, 17 N. W. 252; *Haselton v. Simpson*, 17 N. W. 332; *Edwards v. Sims*, 19 Pac. 710; *Terrell v. Wheeler*, 123 N. Y. 76, 25 N. E. 329; *Smith v. Buffalo*, 159 N. Y. 427, 54 N. E. 62.

Newman, Spalding & Stambaugh, for parties in other cases similarly interested.

Sale was not complete until the sheriff's certificate was issued. Section 15, Woods law. Title could not vest until notice of maturity had been given and proof thereof filed with the clerk of the District Court. Section 14, Ch. 67, Laws of 1897.

The section requires a certificate to be issued to the county. Ch. 1, section 124, Laws of 1875 of Minnesota, is identical with the law in this state. *Gilfillan v. Chatterton*, 33 N. W. 35; *Stewart v. Minneapolis & St. L. Ry. Co.* 31 N. W. 351; *Kipp et al. v. Hill et al.*, 41 N. W. 970; *Vander Linde et al. v. Canfield et al.*, 42 N. W. 538.

The certificate under the Woods law is not made prima facie evidence of title. It is only prima facie evidence that all requirements of law have been complied with regarding the sale, and conclusive notice that the due notice of sale was given. Section 15.

The burden of proof is, therefore, on respondent to show by competent evidence that all provisions of section 14 have been complied with. *Nelson v. Central Land Co.*, 29 N. W. 121.

The deed given by the auditor was not the one that he was authorized to make, and in making it he exceeded his jurisdiction. It does not contain the recitals necessary to its validity.

The deed must recite a compliance with all the terms of the power and the existence of the facts essential to its validity. *Jaggard*,

Tax Titles, 466, 467; Blackwell, Tax Titles, 366; Black, Tax Titles, 399.

YOUNG, C. J. This is an action to determine adverse claims to 160 acres of land situated in Sargent county. The plaintiffs' title comes from the original patentee; that of the defendants from a tax judgment sale under chapter 67, p. 76, Laws 1897. It is conceded that plaintiff's have title unless it has been divested by the proceedings under which the defendants claim title. The trial was to the court without a jury. The findings and conclusions were in all respects favorable to the defendants, and judgment was entered confirming their title and right of possession. Plaintiffs have appealed from the judgment, and demand a review of the entire case in this court.

The questions which were presented upon this appeal as grounds for reversal rest upon undisputed facts. On December 29, 1897, a tax judgment for the taxes of 1894 was entered against the land in question under the provisions of chapter 67, p. 76, Laws 1897, which is entitled "An act to enforce the payment of taxes which became delinquent in and prior to the year eighteen hundred and ninety-five." On February 9, 1898, the sheriff offered the land for sale to satisfy said judgment, and, there being no individual bidders, it was bid in for the county, and a sheriff's certificate of sale issued and delivered. It appears from the findings that on December 21, 1901, which was more than two years after the sale to the county, the defendants, W. E. Purcell and E. A. Divet, paid to the treasurer of Sargent county the amount for which said land had been bid in, with interest thereon, and also the taxes, penalties, and interest which became due upon said land subsequent to the sale, and the treasurer executed and delivered to them an assignment in writing in the form prescribed in section 19 (page 86) of the above act, purporting to transfer all the right, title and interest which the county had obtained by virtue of its certificate of sale. Thereafter, and on January 17, 1902, the county commissioners, in regular session, passed a resolution authorizing the county auditor to execute a special warranty deed of the land in question to the defendants upon payment to the county of all claims for taxes against said land, with interest and penalties, in pursuance of which, on January 28, 1902, the defendants paid the taxes referred to, and the deed thus authorized was executed and delivered to them by the county auditor. The record does not clearly point out the particular years

for which taxes were paid upon each occasion. But, as we understand it, when the assignment was delivered the defendants only paid such taxes as became due after the sale (that is, the taxes for 1898, 1899, 1900 and 1901), and that the remaining taxes (those which became due before the sale, viz. for 1895, 1896 and 1897) were paid on January 28, 1902, when the deed was obtained. In any event, it is undisputed that the defendants completed the payment of all taxes subsequent to those for which the land was sold on the last-named date. It does not appear and is not claimed that the land was sold and forfeited to the county or state under the general revenue laws for the taxes of any of the several years referred to, or that plaintiffs' title has been divested otherwise than by the proceedings taken under chapter 67, p. 76, Laws 1897, for the collection of the taxes of 1894. No notice of expiration of redemption was served by the county or the defendants, and no redemption from said sale has been made or attempted by the plaintiffs, and no offer to pay the taxes or redeem from the sale is made in this action. The defendants claim title both under the assignment and under the deed, and contend that all of the proceedings upon which their alleged title rests were regular and valid; that under chapter 67, p. 76, Laws 1897, no notice of redemption was required to be given by the county when it became a purchaser; that its title became absolute at the expiration of two years from the date of the sale; and that the defendants, having purchased after that date, acquired absolute title.

A large number of other tracts were sold at the same sale, in reference to which other suits are pending, resting upon the same state of facts and involving the same questions as in this case. By request of appellant's counsel, counsel in those cases were permitted to participate in the oral argument and file briefs in this case.

Counsel for appellants challenge the validity of (1) the tax judgment, (2) the sale, (3) the certificate issued to the county, (4) the county's assignment to the defendants, and (5) the deed to the defendants—each upon independent grounds; and further contend that, in any event, the interest which the defendants acquired from the county did not constitute title, and that it has never ripened into title for the reason that notice of expiration of the redemption period was not given. The tax judgment is assailed upon three grounds. It is claimed (1) that the county auditor did not properly certify to the clerk of the district court a copy of the resolution of

the county commissioners designating the newspaper in which the tax list was to be published, and that the copy was not filed in time; (2) that the list as published was not a copy of the list filed; and (3) that the judgment was for an excessive amount. The two grounds first stated present jurisdictional objections. The third, as we shall hereafter see, is not of that character. The provisions which are pertinent to the questions here presented are contained in sections 1, 3, 4 and 6 of the governing statute, chapter 67, pp. 76, 78, 79, Laws 1897. Section 1 requires the county treasurer to make out a list of all taxes upon real estate which appear by his records to have become delinquent in 1895 or prior years, which have not been satisfied by payment, or redemption, or sale of the real estate to actual purchasers, including taxes upon real estate which may have been bid in by or become forfeited to the county or state, and provides that "the list shall contain a description of each piece or parcel of land upon which said taxes shall not have been paid as aforesaid, and opposite such description the name of the owner to whom assessed, if known, and if unknown shall so state, for each year, and the amount of such tax for each year, with penalty and interest;" and to file the same with his affidavit as to its correctness, with the clerk of the district court of his county; and declares that such filing shall have the force and effect of the filing of a complaint in an action by the county against each piece of land described in it to enforce the taxes appearing against it. Section 3 requires the clerk to "make a copy thereof," and to attach thereto a notice, the form of which is given, which recites, among other things, that in default of answer "judgment will be entered against such piece or parcel of land for taxes in said list appearing against it and for all penalties, interest and costs." Section 4 provides that: "The county treasurer shall cause the said notice and list to be published. * * * The newspaper in which such publication shall be made shall be designated by a resolution of the board of county commissioners of the county in which the taxes are laid at least ten days before the filing of such list, a copy of which resolution, certified by the county auditor, shall be filed in the office of the clerk of the district court." Section 6 requires the clerk to enter judgment against each piece of land in default of answer upon the expiration of thirty days from the last publication of such notice and list. The county commissioners passed the resolution required by section 4, *supra*, on July 16, 1897, and on

October 6th thereafter the auditor filed with the clerk a certified copy thereof, which was as follows: "Be it resolved, that the Sargent County Independent, a legal newspaper published at Forman, North Dakota, be and the same is hereby designated to publish the special delinquent real estate tax list pursuant to chapter 67 of the Session Laws of 1897. The bond for said publication was on motion fixed at \$500." "I, A. N. Carlblom, auditor of Sargent county, North Dakota, do hereby certify that the above resolution was duly passed and adopted by the board of county commissioners of Sargent county at their regular meeting July 16, 1897. Dated July 16, 1897. A. N. Carlblom, County Auditor." The auditor filed the list in the clerk's office on September 22, 1897. The first publication was on October 21, 1897, and the last on November 4, 1897. We think the objection that the resolution was not properly certified to the clerk, and that it was not filed in time, is untenable. The passage of the resolution and the filing of a copy of the same, in compliance with section 4, *supra*, are jurisdictional steps. This court so held in *Cass County v. Improvement Co.*, 7 N. D. 528, 75 N. W. 775. But we find no failure in either particular. The objection is directed to the form of the auditor's certificate and to the absence of a seal. The statute does not prescribe a form of certification, or require that the auditor's certificate shall be under seal. As to the sufficiency of certificates of this nature, it is said that: "Where the form of a certificate is not prescribed in the act, it must be of such nature that it will substantially apprise the person to whom it is to be delivered of the facts sought to be brought to his notice, and upon which he is required to act." *People v. Foster* (Sup.) 58 N. Y. Supp. 574. See, also, *State v. Gee*, 28 Or. 100, 42 Pac. 7; *State v. Brill*, 58 Minn. 152, 59 N. W. 989; *State v. Schwin*, 65 Wis. 207, 26 N. W. 568. It will be noted that the certificate required by the above section is not for the purpose of making the copy admissible in evidence. It is not, therefore, governed by the statute relating to such copies. See section 5700, *Rev. Codes 1899*. *Kipp v. Dawson* (Minn.) 60 N. W. 845. For this reason the case of *Sykes v. Beck*, 12 N. D. 242, 96 N. W. 844, cited by counsel for appellants, is not in point. The objection that the auditor's official signature on the copy is not attested by the county seal does not affect its character, for the reason that the statute does not require it. Where the statute authorizes an officer to make a certificate, and does not expressly require the affixing of

a seal, it is not necessary, and the absence of the seal has no effect. *Irving v. Brownell*, 11 Ill. 407; *Baze v. Arper*, 6 Minn. 220 (Gil. 142); *Thompson v. Morgan*, 6 Minn. 292 (Gil. 199); *Orcutt v. Polsley*, 59 Neb. 575, 81 N. W. 616; *Farnum v. Buffum*, 58 Mass. 260; *Paine v. French*, 4 Ohio 318; *Ashley v. Wright*, 19 Ohio St. 291; *Fund Com'rs v. Glass*, 17 Ohio, 542; *Dumont v. McCracken* (Ind.) 6 Blackf. 355; *Maxwell v. Hartman* (Wis.) 8 N. W. 103; *Young v. Wood*, 63 Neb. 291, 88 N. W. 528. The purpose of the filing is to inform the clerk and the public in an official way of the newspaper in which the list is to be published. In our opinion, the certification was entirely adequate for that purpose. It was, in fact, more formal than those which were held sufficient by this court in *Cass County v. Improvement Co.*, *supra*, and *Emmons County v. Bank*, 9 N. D. 583, 84 N. W. 379. And it was filed in time. No time is expressly fixed by the statute for filing the copy of the resolution, but we think the purpose of the filing is accomplished, and the spirit of the statute complied with, if it is filed before the first publication. Neither, in our opinion, is there any merit in the second objection, namely, that the list as published was insufficient. True, it was not a literal copy of the list filed, but it was not necessary that it should be. The deviations were in matters of phraseology and arrangement, and did not alter the substance, and were in no respect misleading or prejudicial. Instead of the words "Name of Owner; If Known, So State," appearing in the headings of the filed list, the word "Names" was used; instead of "Subdivision of Sec. or Lot," "Description;" for "Yr. for Which Tax Became Delinquent," "Year;" for "Amount of Tax," "Amt;" and for "Penalty and Interest to Date," "Cost" was substituted; and the township and range, instead of appearing at the head of each column, were stated under the cross-line method. The statute declares what facts the list shall embrace but does not prescribe the form in which they shall be set out. That is left to the discretion of the official charged with its preparation. Both the filed list and the published list contained all that the statute requires. There was no difference in matters of substance. A variance in substance cannot be overlooked, but mere informalities, or a variance in matters not of substance, occurring in an attempt to comply with the statute, will not be fatal. *Cooley on Tax'n* (3d Ed.) sections 931, 895; *Smith v. Messer*, 17 N. H. 420, 427; *Kane v. Brooklyn*, 114 N. Y. 586, 21 N. E. 1053.

The third ground of objection to the validity of the judgment, namely, that it was for an excessive amount, must also be overruled. Both the filed list and the published list stated the amount of the tax at \$22.72, penalties and interest \$7.72, the total amount at \$30.44, and judgment was entered for the latter sum. It is contended that a correct computation of the penalty and interest under the rule laid down in *Wells County v. McHenry*, 7 N. D. 246, 74 N. W. 241, will show that but \$6.13 was due, and that the judgment was, therefore, for an excessive amount. For the purposes of this case it may be conceded that the computation made by the treasurer and stated in the list was erroneous. That fact, however does not affect the jurisdiction. The clerk is not given authority to make computations. It is his duty, under the statute, in default of answer, to enter judgment for the amount appearing upon the list. If there was error in computation or in stating the amount, these were issues to be raised and adjudicated upon appearance and answer, and, in default of answer, jurisdiction existed to enter judgment for the amount stated in the list. This point is controlled by our decision in *Emmons County v. Bank*, 9 N. D. 583, 594, 84 N. W. 379, and the cases therein cited. It follows, for the reasons stated, that the attack upon the validity of the judgment cannot be sustained.

The sale is attacked upon the ground that it was made for an excessive amount. The land was bid in for \$37.27, and it is said that this sum included an illegal item of \$5.60 for sheriff's fees. We are agreed that the inclusion of this item did not render the sale void. Section 15 of this act (Laws 1897, p. 85, c. 67) expressly enumerates the grounds upon which a sale may be held invalid, and the fact that the sale was for an excessive amount is not one of them. Parties in interest are given relief for such errors without disturbing the sale. Section 23 provides that: "Upon application of the party entitled thereto, the treasurer shall pay to such party any money paid into the treasury on the sale of any piece or parcel of land in excess of the amount due upon such piece or parcel at the time of the sale, or for any money paid in for redemption, which he may pay to the purchaser at the sale, or other person appearing from his copy judgment book to hold the right acquired at the sale, taking duplicate receipts therefor." A similar contention was urged, and overruled by this court, in *Shattuck v. Smith*, 6 N. D. 56, 73, 69 N. W. 5. In that case a sale made under the general revenue law of 1890 was attacked upon the ground that it was for an excess-

ive amount. The court said: "Assuming this to be the case, we are nevertheless clear that, in view of the provisions of sections 72 and 82 of the Revenue Laws of 1890, pp. 404, 407, c. 132, the sale was not thereby rendered invalid. Section 72 (in substance like section 15, *supra*) in terms declares that no tax sale shall be set aside or declared invalid unless for certain reasons therein specified, and a sale for an excessive amount is not one of the cases so specified. Section 82 (similar to section 23, *supra*) vests in the owner of the fee the right to obtain from the auditor a warrant on the county treasurer for any amount paid into the treasury on the sale of any piece or parcel of land for taxes in excess of the amount due upon such piece or parcel at the time of the sale. If, for any reason, whether because the purchaser sees fit to bid more than the amount of the tax, or because the auditor, in settling makes a mistake in computing the amount due, the purchaser pays more than the amount due at the time of the sale for taxes assessed against the property, the owner can call upon the auditor to give him a warrant upon the treasurer for such excess. Should the auditor fail to comply with that request, in a proper case mandamus would lie to compel him so to do. It follows that no injury can accrue to the owner from the sale of this property for an amount in excess of the taxes due, and it is therefore entirely reasonable that it should be provided in another section (section 72) that such a sale should not be set aside as invalid." See, also, *Sutherland v. City of Brooklyn*, 87 Hun, 82, 33 N. Y. Supp. 959; *People v. Palmer* (Sup.) 41 N. Y. Supp. 760. While our conclusion that the sale is not invalid because for an excessive amount is based upon the statute, we do not wish to be understood as conceding that, independent of the statute, it is subject to collateral attack. The rule seems to be that, where a sale is made under a valid tax judgment, it is within the rule which exempts it from collateral attack. *Jaggard on Tax'n*, 433, 456; *Black on Judgments*, section 245, note 1, and section 247.

As to the objections to the certificate issued to the county, it is sufficient to say that it is in the form prescribed by the statute, and that the objections to it are not of sufficient merit to require discussion. The questions affecting the assignment and the deed are of a more serious character. They are so closely connected that they will be considered together. The important question in this connection is as to the character of the county's interest or estate in the land at the time these instruments were executed and delivered.

Both of them were delivered more than three years after the sale. The defendants' contention is that by reason of the failure of the owners to redeem from the sale within two years the land was forfeited to the state, and its title became absolute, and that they succeeded to such title through the transfers above referred to. The plaintiffs contend, on the other hand, that under this act the title does not pass until the right of redemption is eliminated by the service of notice of expiration of redemption, and that the service of such notice is as obligatory upon the county, when it is the holder of a certificate, as it is upon the individual holder. It may be stated at the outset that chapter 67, p. 76, Laws 1897, does not provide for the issuance of a deed at any time or upon any contingency. The certificate is the only muniment of title which the county issues, and title passes by operation of law when the redemption period has expired, and not before. The crucial question is, when does the redemption period expire? This can only be answered by a construction of the several provisions of the act relating to the subject of redemption, to which we will now refer. Section 20 provides that "any person having any estate or interest in the property, wishing to redeem from such sale, may make such redemption at any time within two years" by making the payments therein prescribed. If this were the only provision, it would be clear that the redemption period is absolutely limited to two years. This section, however, is only one of a number relating to the same subject, in connection with which it must be read and construed. Section 13 provides that in default of a sale to individual purchasers "the county treasurer shall bid in the same for the county." Section 14 provides a form of certificate which "the sheriff shall execute to the purchaser," which, by express recitals, is made to answer for sales to the county as well as to individual purchasers. This section also contains the following significant, and, in our opinion, decisive, provision: "Such certificate, in case the land shall not be redeemed, shall pass to the purchaser, or the state or county, the estate therein expressed, without any other act or deed whatever. * * *

Provided, however, that the holder of any certificate for any piece or parcel of land sold under any tax judgment, must, ninety days preceding the maturity of such certificate, give personal notice to the owner, if a resident of the state, of the expiration and maturity of such certificate. * * *

The fee simple of any piece or parcel of land named in any certificate shall not vest in the holder thereof

until the notice provided for herein is given and due proof thereof filed with the clerk of the district court." Section 19 authorizes the county treasurer to assign the right of the state or county in any piece or parcel of land bid in by it "at any time before the time for redemption expires" upon the payment of the amount for which it was bid in, with interest, "and the amount of any subsequent taxes, penalty, and interest upon the same," and prescribes a form for such assignment. This act gives no authority for transferring the interest which the state or county may acquire other than by assigning its certificate. Is the right of redemption eliminated, and does the redemption period expire, by the mere passage of the two-year period? Clearly not. Time is only one of the elements essential to terminate it. The statute expressly requires an affirmative act on the part of "the holder of any certificate" to effect this result, namely, the service of notice of the expiration of the redemption period. It may be said that the redemption period is two years, and this is, in a sense, true. But it may be more, contingent upon delay in serving the notice of redemption. The owner has an absolute period of two years in which to redeem, which cannot be reduced by any act of the holder of the certificate. The latter may, by serving notice the required length of time before the two years expire, restrict the owner's right of redemption to two years from the date of sale, and thus cause his lien to ripen into title. But the redemption period does not expire, and the certificate does not mature or the lien ripen into title, until the statutory notice is given, for it is expressly provided that the title "of land named in any certificate shall not vest in the holder thereof until the notice provided for herein is given," etc. There is no ambiguity in this language, or doubt as to its meaning. Clearly, the effect of delay in giving the notice is to postpone the expiration of the redemption period. While conceding that notice is necessary in case of individual purchasers, counsel for defendants contend that the county is exempt from giving the notice, and that its interest ripens into title by the mere passage of time. We find no ground or reason for sustaining this view. The language of the act negatives any such conclusion. Section 14 requires "the holder of any certificate" to give notice, and the same section provides that title "shall not vest in the holder thereof" until the notice is given. The county is the holder of a certificate, and if it were conceded that it can acquire title under this act—a point that we do not decide—it is clear that it cannot do so without giving

the notice which is required of "the holder of any certificate." It is contended that chapter 67, p. 76, Laws 1897, was taken bodily from the state of Minnesota, and that we should be governed by the case of *State v. Smith*, 36 Minn. 456, 32 N. W. 174, wherein it was held that such notice is not required to be served on behalf of the state. The statement that this act was taken in its entirety from Minnesota is not entirely correct, and we think the differences in the statute considered in the case just cited are so vital that it is valueless as a precedent. In its general structure and purpose our act corresponds with the Minnesota statute, and was undoubtedly borrowed from it. A large number of sections are identical. Some have been altered in unimportant particulars, while others have been wholly omitted. The provisions transferring the authority to make sales and execute certificates from the auditor to the sheriff, are peculiar to this state. In the particulars which were controlling in the case of *State v. Smith* it is utterly unlike the statute there under consideration. The decision in that case was based upon section 37, c. 6, p. 42, Laws 1877; Gen. St. 1878, c. 11, section 121. That section provided that "every person holding a tax certificate" should give notice through the agency of the county auditor or sheriff, and that "the county should not be liable for any expense incurred" in giving such notice. Our statute requires "the holder of any certificate" to give notice, and contains no provision exempting the county from liability. The Minnesota act provided that lands bid in for the state, and "not redeemed within three years from the date of sale, shall become forfeited to the state." Our act contains no such provision. And the Minnesota act, unlike our own, contains an express provision for the sale of the lands so forfeited. But the vital difference lies in the entire absence from the Minnesota statute of any provision corresponding with section 14 of our act, which declares that title shall not vest until notice is given. The section of the statute construed in *State v. Smith* was amended by chapter 198, p. 310, Laws 1889, by providing, among other things, that "the title * * * shall not vest in the purchaser and the time for redemption shall not expire until the notice contemplated by this act shall have been given by said purchaser." Our statute was taken from the section as amended. It was held in the recent case of *Cole v. Lamm*, 81 Minn. 463, 84 N. W. 329, that under the amendment notice is required in all cases, and that title does not become vested in the

state by the mere expiration of the three year period. The court said: "In a word, our conclusion is that as to all land forfeited to the state subsequent to 1889 the owner had a vested right to the sixty-day notice of expiration of redemption after the state had sold the land to an actual purchaser." The former case does not conflict with, and the latter fully sustains, our conclusion that the redemption period does not expire, or the certificate mature, until the notice of expiration of redemption has been given. *Kenaston v. Great Northern Ry. Co.*, 59 Minn. 35, 60 N. W. 813; *State ex rel Kipp v. Peltier*, 86 Minn. 181, 90 N. W. 375; *State v. Bigelow*, 52 Minn. 307 54 N. W. 95.

Inasmuch as the county had only a lien upon the land when the defendants obtained the assignment and deed, it could transfer to them no greater interest or estate. Having a mere lien, it could transfer only a lien, and that was effected by the assignment. The deed, even if it were executed by authority, could not convey title, for the county had no title to convey. The assignment is in the form prescribed by the statute, and it is conceded that all taxes subsequent to that for which the land was sold were paid to the county. The fact that they were not all paid when the assignment was delivered does not render it invalid. True, the payment of all subsequent taxes was essential to the authority of the auditor to assign the certificate. *Security Trust Co. v. Von Heyderstaedt*, 64 Minn. 409, 67 N. W. 219; *Hoyt v. Chapin* (Minn.) 89 N. W. 851. But it was not necessary that the assignment should be delivered and payment made at the same time. Both were necessary, and both had been complied with. When the final payments were made, the sale of the certificate was fully executed, and nothing remained to be done to make the sale effective and valid. See *Pigott v. O'Halloran*, 37 Minn. 415, 35 N. W. 4; also *Woodman v. Clapp*, 21 Wis. 355; *Smith v. Board*, 44 Wis. 688.

It follows that the trial court erred in entering judgment confirming title and right of possession in the defendants. It is directed to vacate its judgment, and enter judgment confirming the defendants' lien under their tax certificate, with costs in the district court. Appellants will recover costs in this court. All concur.

(100 N. W. 726.)

OLE SIMENSEN v. RHODA SIMENSEN.

Opinion filed July 26, 1904.

Publication of Summons — Affidavit — Showing of Diligence.

1. Under the provisions of the Code formerly in force in this state, an affidavit for publication of summons which fails to show that proper diligence was used to find the defendant in this state is fatally defective, and a publication of summons based upon such affidavit confers no jurisdiction of the person of the defendant.

Appearance Makes Void Process Valid.

2. A defendant who has not been properly served with summons, who moves to vacate a default judgment entered in favor of plaintiff, upon jurisdictional grounds, but also asks permission to file an answer, thereby waives service of summons by making a general appearance, and jurisdiction over the person of such defendant is complete from the date of such general appearance, but does not relate back, so as to cure void proceedings theretofore had.

Appeal from District Court, Ramsey county; *Palda, J.*

Action by Ole Simensen against Rhoda Simensen. Judgment for plaintiff. Defendant appeals.

Reversed.

George E. Dietrich, John F. Henry, and Henry M. Gray, for appellant.

Affidavit for publication of summons must not follow in the language of the statute merely, but state the evidential facts showing the existence of ultimate facts requisite to the granting of an order for the publication. *Beach v. Beach*, 6 Dak. 371, 43 N. W. 701; *Coughran v. Markley*, 87 N. W. 2; *Bothell v. Hoellwarth*, 74 N. W. 231.

Affidavit must show not only that the defendant was a nonresident; but that she could not be found in the state. *Bothell v. Hoellwarth*, supra; *Carlton v. Carlton*, 85 N. Y. 313.

Publication cannot be granted on an uncertain showing, but only on facts existing at the date of the order or very nearly prior thereto. *Rosevelt v. Land & River Co.*, 84 N. W. 157; *New York Baptist Union for Ministerial Education v. Atwell et al.*, 54 N. W. 760; *Adams v. Hosmer*, Circuit Judge, 56 N. W. 1051; *Forbes v. Hyde, et al.*, 31 Cal. 342; *Cohn v. Kember*, 47 Cal. 144; *Armstrong v. Middlestadt*, 36 N. W. 151; *Campbell v. McCahan*, 41 Ill. 45;

Foster v. Jelinski, 3 Ill. App. 345; Rockman v. Ackerman, 85 N. W. 491.

Where notice is given by publication, the court acquires no jurisdiction to render judgment until proper proof of compliance with the statute appears of record. 17 Enc. Pl. & Pr. 47; Barber v. Morris, 37 Minn. 194; Priestman v. Priestman, 72 N. W. 535; Horn et al. v. Indianapolis Nat'l Bank, 25 N. E. 558; Reed v. Catlin, 6 N. W. 326; Allen v. Richardson, 92 N. W. 1075.

Townsend & Denoyer, for respondent.

Order for publication of summons recites the filing of the affidavit of publication; the clerk's file marks made later does not dispute the record, nor will the law permit it to, as the recital imports verity and is conclusive. Northwestern Mutual Life Ins. Co. v. Neeves, 49 N. W. 832; Connolly v. Rue, 35 N. E. 824.

The filing of the affidavit of publication is unnecessary before judgment. Allen v. Richardson, 92 N. W. 1075; Dowell v. Lahn, 97 Ind. 146; Wyatt's Admr. v. Steele, 26 Ala. 639; Searle v. Gilbraith, 73 Ill. 269; 1 Freeman on Judgments, section 127 p. 224; Collins v. Regan, 32 Barb. 647; Belmont v. Cornen, 82 N. Y. 256; Barnard v. Heydrick, 49 Barb. 92; Knapp v. King, 6 Ore. 243; Goodale v. Coffee, 24 Ore. 346; Coughran v. Markley, 87 N. W. 2.

Verified complaint constitutes part of the affidavit of publication. 17 Enc. Pl. & Pr. 76.

The affidavit was sufficient. Belmont v. Cormen, 82 N. Y. 256.

FISK, District Judge. This appeal calls in question the correctness of an order made by the district court of Ramsey county on September 24, 1903, denying defendant's motion to vacate a default judgment of divorce granted to plaintiff on January 31, 1894. The record discloses that the only service of the summons relied upon by plaintiff was what is known as "constructive service," or service by publication. The motion to vacate was based upon a petition signed by defendant's attorneys, and also upon the affidavit of defendant and others annexed to said petition, from which it appears that the plaintiff and defendant were married in 1880 in the state of Wisconsin, where they lived together as husband and wife for about four years, after which they removed to Ramsey county, this state, where they lived together for about six years, or until October, 1889, at which time the defendant left the plaintiff for alleged cause, and went to the state of Wisconsin, where she

has ever since resided; that on June 3, 1893, a summons was issued in said action, and a verified complaint was filed in the office of the clerk. On said date the sheriff of said county filed his return, stating that "on the 3d day of June, 1893, the annexed summons and complaint were placed in my hands for service, and thereupon I made diligent search within the body of the county of Ramsey for Rhoda Simensen, defendant, and, after due diligence, I was unable to find defendant, so as to make personal service, for the reason that said defendant does not reside within said county, nor within the state of North Dakota, as I am informed by John O. Siverson, Ever Wagness, and A. J. Stade, former neighbors and acquaintances of defendant. I am further informed by them that she removed from the state during the year 1890, and now resides at Whitehall, Trempealeau county, state of Wisconsin, as I verily believe." The next step taken was on the 26th day of October following, at which date an affidavit was made by one of plaintiff's attorneys as follows (omitting title): "Joseph Denoyer, being first by me duly sworn, deposes and says that he is one of the attorneys for the plaintiff in the above-entitled action, and that plaintiff has a just cause for action against the defendant herein, as will appear by the complaint of the plaintiff, a copy of which is hereto annexed; that said action is for divorce from defendant by plaintiff, and that said defendant cannot, after due diligence, be found in the state of North Dakota; that a summons was duly issued against said defendant, and placed in the hands of the sheriff of said county for service, but was returned by said sheriff with his endorsement thereon that said defendant does not reside within said county of Ramsey, nor within the state of North Dakota, as he was informed by John O. Siverson, Ever Wagness, and A. J. Stade, former neighbors and acquaintances of defendant; that he was further informed by them that she removed from said state during the year 1890, and now resides at Whitehall, Trempealeau county, state of Wisconsin, as he verily believes; that said summons and return are hereto attached, and that the place of residence of said defendant is, as affiant is informed, at West Superior, Wisconsin, she having removed from Whitehall, Wisconsin, to Superior; that he was so informed by letter from one W. L. Frederickson, sheriff of Trempealeau county, Wisconsin." Upon the back of said affidavit appears an order dated October 26, 1893, in the usual form, directing service

of the summons by publication in a newspaper; said order also directing a copy of the summons and complaint to be forthwith deposited in the post office, postage prepaid, and directed to the defendant, at West Superior, Wis. This affidavit and order were not filed with the clerk until February 1, 1894. On January 31, 1894, an order for judgment in due form was made, and it appears that an affidavit of mailing summons and complaint pursuant to the order for publication of summons, together with the publisher's affidavit showing such publication, and also an affidavit of defendant's default, were filed on February 1st. It also appears that the only service of the summons was by publication, and that defendant had no knowledge of the pendency of the action until a short time before her application was made to vacate said default judgment. It is alleged in the petition of defendant that neither party has remarried since the rendition of the judgment aforesaid, and the defendant prays the court to declare the said judgment void, and, further, that she be given a reasonable time in which to file her answer, and that she have certain other relief by way of alimony. The ground alleged by defendant in support of her motion to vacate said judgment is that the court acquired no jurisdiction to render such judgment, for the reason that no service of the summons was made upon her; the attempted service by publication being void by reason of a noncompliance with the provisions of the Code relative to constructive service. It is contended by appellant that the affidavit upon which the order for publication of the summons was based is fatally defective, and further that because such affidavit, as well as the order aforesaid, were not filed until after such judgment was rendered, the same is void.

We are unable to agree with the district court in its ruling upon said motion. The affidavit presented as a foundation for the order permitting constructive service of the summons was defective, and the proceedings based thereon were insufficient, in our opinion, to confer jurisdiction. The affidavit failed to show, as the law required at that time, any diligence to effect personal service within the state. It has repeatedly been held, not only in this jurisdiction, but elsewhere, that the affidavit must show such facts as will enable the court to judicially determine that personal service upon the defendant cannot be made within the state; and the law in force at the time said affidavit was presented, and said order made, expressly

so required. The statute was mandatory, and a failure to comply strictly therewith operated to confer no jurisdiction over the person of the defendant. *Beach v. Beach*, 6 Dak. 371, 43 N. W. 701; *Yorke v. Yorke*, 3 N. D. 343, 55 N. W. 1095; *Bothel v. Hoellwarth*, 10 S. D. 491, 74 N. W. 231; *Carleton v. Carleton*, 85 N. Y. 313; *McCracken v. Flanagan*, 127 N. Y. 493, 28 N. E. 385, 24 Am. St. Rep. 481; *Kennedy v. New York Life Ins. Co.*, 32 Hun. 35; *Greenbaum v. Dwyer*, 66 How. Prac. 266. The affidavit simply sets forth, in the language of the Code, "that the said defendant cannot, after due diligence, be found in the state of North Dakota;" and it also states that the place of residence of said defendant is, as affiant is informed, at West Superior, Wis., such information being received by letter from one W. L. Frederickson, sheriff of Trempealeau county, Wis. There is nothing to show when this information was imparted to the person who made said affidavit. But under the foregoing authorities, which we think are sound, said affidavit would be defective even if it appeared that such information was imparted to affiant within a reasonable time preceding the making of said affidavit. In *Carleton v. Carleton*, *supra*, the affidavit upon which the order was granted stated that "the defendant has not resided within the state of New York since March, 1877, and deponent is informed and believes that defendant is now a resident of San Francisco, California." Such affidavit was held fatally defective. We quote from the opinion as follows: "The appeal presented involves the question whether an affidavit showing non-residence, without proof where the defendant actually was at the time, makes out a case within the provision of section 135, herein cited. The affidavit states that the defendant has not resided in the state for some time, and, on information and belief, where he does reside. There is no statement, however, that due diligence has been used, or that any effort whatever has been made to find him, and that he cannot be found within the state. It is a simple allegation of nonresidence, from which fact the court were asked to infer that due diligence had been used. The Code evidently meant to require proof that the defendant could not be found after due diligence. The proof furnished does not establish such diligence, for it might well be that the defendant might be found within the state if a diligent effort had been made to seek him out. It is a well-known fact that many persons who are residents of one state have places

of business, and transact such business, in a state different from that in which their residence is located. They are frequently in the latter state, and pass most of their time there. Such persons could be readily found in the state where they do business if due diligence was used for such purpose, and nonresidence, of itself, does not necessarily show that they cannot be found within the state, or raise a presumption that due diligence has been used, or that it was not required. It is not nonresidence alone which constitutes the ground for making the order, and it therefore cannot be urged that proof of this fact furnishes sufficient reason for a conclusion of the judicial mind that due diligence had been employed to find the defendant within the state." The affidavit in the case at bar differs from the one in the New York case only in the fact that in the case at bar the affidavit states that the summons was placed in the hands of the sheriff of Ramsey county, and returned by him, with his statement to the effect that the defendant does not reside within said county of Ramsey, nor within the state of North Dakota, as he was informed by certain persons therein mentioned, who were former neighbors and acquaintances of defendant, and that he was informed by said persons that defendant removed from said state during the year 1890, and resides at Whitehall, Trempealeau county, Wisconsin, as he verily believes. The affidavit does not even show that the sheriff returned that he was unable to make personal service within the state, or that he had used any diligence to find the defendant; but, conceding that such return was made a part of the affidavit and showed such facts, yet the record shows that this return was made by the sheriff on the 3d day of June, 1893, while the order for publication was not made until October 26th following, and we think it well settled that such showing of diligence is wholly insufficient. Proof that personal service could not be made upon the defendant within the state on June 3d was no proof that it could not be made in October following. The showing required to obtain an order for publication should be made within reasonable time prior to the granting of the order. 17 Enc. Pl. & Pr. p. 58, and cases cited. We conclude, therefore, that the order for publication was made without any showing of diligence to effect personal service within the state. This being true, it necessarily follows that the judgment is void, and it was error to deny defendant's motion to vacate the same. The defendant never

was summoned to appear and answer plaintiff's complaint, and hence never had her day in court. This she had an absolute right to, and no lapse of time would bar such right. We deem the citation of authorities unnecessary upon a proposition so well settled. The fact that defendant has by this motion made a general appearance in the action, which she did by asking to be permitted to answer and proceed to trial on the merits, will not avail respondent. Such general appearance did not relate back, so as to validate the void proceedings. Its only effect was to confer jurisdiction over the person of defendant from its date.

The motion to vacate was resisted by respondent apparently upon the erroneous theory that the merits of the controversy should control the court in the disposition of said motion. The plaintiff presented a long affidavit made by himself, and also affidavits by others, but these affidavits tended only to show that defendant did not have a meritorious defense. Conceding the truth of all the facts set forth therein, it is clear that defendant should prevail on said motion. The defendant, not having been served with summons, was not in default, and she had an undoubted right to join issue upon the allegations of the complaint, and to have such issues tried in the usual manner, and not by affidavits. This was refused her by the order complained of.

The foregoing renders it unnecessary for us to consider the other questions raised by appellant, but, upon the question as to the necessity for filing the affidavit and order for publication before the publication is made, see 17 Enc. Pl. & Pr. p. 56, and numerous authorities cited.

The order appealed from is reversed, and the district court is directed to permit the defendant to answer within thirty days from the date of the filing of the remittitur herein in the court below. All concur.

MORGAN, J., being disqualified, took no part in the foregoing decision; Judge FISK, of the First Judicial District, sitting in his place by request.

(100 N. W. 708.)

VICTOR L. JOSEPHSON v. SIGURJON SIGFUSSON.

Opinion filed August 2, 1904.

Cross-Examination — Discretion of Court.

1. The matter of permitting leading questions to be asked a witness, and the limits to which cross examination will be allowed, rest very largely in the discretion of the trial judge, and his action will not be disturbed in the absence of a manifest abuse of such discretion.

Failure of Witness to Attend — New Trial — Accident and Surprise.

2. In cases where a witness not subpoenaed, but who promised to attend the trial, fails to attend, owing to sickness, such sickness becoming known to defendant during the trial, his failure to attend is not ground for granting a new trial, under subdivision 3 of section 5472, Rev. Codes 1899, making "accident or surprise which ordinary prudence could not have guarded against" a ground for a new trial, when no motion for a continuance was made after the witness' sickness became known to defendant.

Failure of Attorney to Notify Opposing Counsel — New Trial.

3. The failure of one attorney to notify another when a case will be called, if an agreement to do so is made, will not be ground for a new trial, unless the attorney to be notified has used diligence to attend after learning from other reliable sources when the case is to be called.

Appeal from District Court, Pembina county; *Kneeshaw, J.*

Action by Victor L. Josephson against Sigurjon Sigfusson. Judgment for plaintiff, and defendant appeals.

Affirmed.

Skulason & Skulason and *Bosard & Bosard*, for appellant.

If the evidence permitted or prevented by surprise is probably sufficient to change the result, a new trial should be granted although such evidence is cumulative and impeaching. 14 Pl. & Pr. 747; *South's Heirs v. Thomas' Heirs*, 23 Ky. 59; *Leckie v. Crain*, 12 La. 432; *Ruggles v. Hall*, 14 Johns 112; *Jackson v. Warford*, 7 Wend. 62; *Tilden v. Gardinier*, 25 Wend. 663; *Smith v. Rawlings' Admr.* 3 S. E. 238; *Griffin et al. v. Towns et al.*, 25 S. W. 968.

Plaintiff's counsel failed to notify defendant's counsel of the time of trial. A new trial will be granted when the surprise is due to the conduct of the prevailing party by which he has some advantage. 14 Enc. Pl. & Pr. 742, 743; *Symons v. Bunnell et al.*, 22 Pac. 193;

Robertson v. Williams, 22 Pac. 665; Stoppelfeldt v. Milwaukee, etc., Ry. Co., 29 Wis. 688; Hull v. Vining, 49 Pac. 537; Chicago, St. P., M. & O. Ry. Co., v. Deaver, 63 N. W. 790; Maddox et al. v. Cleary, 52 N. W. 288; First Nat'l Bank of Storm Lake v. Harwick, 37 N. W. 171; Adams v. Ratbun, 86 N. W. 629; Petersen v. Koch, 81 N. W. 160; White v. Richards, 49 S. W. 337; Dodge v. Ridenour, 62 Cal. 263; Anderson v. Scotland, 17 Fed. 697; McCotter v. Shoreham, 49 Atl. 695; Southwestern T. & T. Op. v. Jennings, 51 S. W. 288; Fitzgerald v. Wygal, 59 S. W. 621; Sturgeon v. Hitchens, 22 Ind. 107; Head v. A. & L. Tie Co., 70 S. W. 55; Thrasher v. Anderson, 45 Ga. 538; Rust v. Ketchum, 46 Ga. 534; Triplett v. Scott, 68 Ky. 81.

P. E. Halldorson, M. Brynjolfson and J. D. Laxdahl, for respondent.

The admission or exclusion of leading questions is within the discretion of the trial court and the exercise of such discretion will not ordinarily be reviewed. White v. White, 23 Pac. 276; Funk v. Babbitt, 41 N. E. 166; Goudy v. Werbe et al., 19 N. E. 764; City of Harvard v. Stiles, 74 N. W. 399; Kohler v. West Side Ry. Co., 74 N. W. 568; Jones on Ev. section 819; Freeman v. City of Huron, 73 N. W. 260; State v. Chee Gong, 21 Pac. 882; Blakemore v. Blakemore, 18 N. W. 103.

There was no prejudice in the exclusion or admission of testimony in question inasmuch as defendant admits the facts testified to. Mucci v. Houghton, 57 N. W. 305; State v. Munson, 34 Pac. 932; People v. Fong Ah Sing, 11 Pac. 323.

If defendant at any time made any statement or admission which could reasonably be construed to be inconsistent with his testimony on the stand, it was proper to show it on cross-examination. Sayres v. Allen, 35 Pac. 254; Jones Ev. sections 826, 838; Schultz v. Chicago & N. W. Ry. Co., 31 N. W. 321.

The absence of a material witness must be brought to the attention of the trial court before the trial, by motion for a continuance; failure to do so, party will be held to have elected to go to trial without him and must abide the consequences. Rule XXVI, District Court Rules; Gaines v. White, 1 S. D. 434, 47 N. W. 524, 50 N. W. 901; Hughes et al. v. Richter, 43 N. E. 1066; McLearn v. Hapgood et al., 24 Pac. 788; Schellhouse v. Ball, 29 Cal. 605; 14 Enc. Pl. & Pr. 741, 749 and note 3; 1 Spelling on New Trial, section 388.

If motion for continuance were seasonably made, the plaintiff would have had the right to proceed to trial on stipulating that the absent witness, were he present, would have testified to the facts claimed, and this right he could not be deprived of by a neglect of defendant to make a motion. *Sanford v. Gates*, 16 Pac. 807; *Hutton v. Bank*, 45 S. W. 668; *Matthews v. Railway Co.* 44 S. W. 802; 4 Enc. Pl. & Pr. 866; *White Sewing Machine Co. v. Simpson*, 74 N. W. 197; 1 *Spelling on New Trial*, section 143.

Under a general denial the proposed testimony would have been inadmissible, and a continuance if asked for could not have been admitted. *Cohn v. Brownstone*, 28 Pac. 953; *Nebraska & D. Land & Live Stock Co. v. Burris*, 73 N. W. 919.

The order granting or refusing a new trial on the grounds of accident or surprise is a discretionary one, and will be reversed only for a manifest abuse of discretion. *Gotzian v. McCollum*, 8 S. D. 186, 65 N. W. 1068; *Burdick v. Haggart*, 4 Dak. 13, 22 N. W. 589; 1 *Spelling New Trial*, section 187.

MORGAN, J. This is an action for a balance claimed to be due the plaintiff from the defendant on account of money collected for the plaintiff by the defendant as his agent. The answer pleads full payment. A verdict was rendered for the full amount claimed by plaintiff. Defendant made a motion for a new trial on the following grounds: (1) Alleged errors of law relating to the admission and exclusion of evidence; (2) on the ground that one of defendant's witnesses unexpectedly failed to appear at the trial because of his sickness; (3) upon the ground that defendant was compelled to proceed to trial without the assistance of his attorney of record in the case, for the reason that plaintiff's attorney had failed to notify said defendant's attorney when the case would be called, as he had agreed to do; and (4) insufficiency of the evidence to sustain the verdict. The motion for a new trial, based on a settled statement of the case, was denied, and judgment rendered on the verdict. The defendant appeals to this court from the judgment.

The cause of action set forth in the complaint was based upon the following facts: The plaintiff is a stepson of one Christian S. Bakkman. Bakkman and plaintiff were not on very friendly terms. There was a controversy between them in regard to certain money held by Bakkman which plaintiff had inherited from his father. Plaintiff was anxious to have this money paid to him by Bakkman, and claims that he employed the defendant, Sigfusson, as his

agent to collect and receive the money from Bakkman. Plaintiff claims that the defendant did collect all of said money, as his agent, but has refused to turn it over to plaintiff, except about \$600 of it. So far as the payment to defendant is concerned, we are agreed that the evidence showed by a clear preponderance that defendant was employed by plaintiff to collect it, and that he did collect it, and has only turned over about \$600 of it, and has only accounted for that sum. The jury found for the plaintiff for the full amount claimed, and the verdict was sustained by competent evidence. The verdict is not assailed on any ground that can be sustained, so far as the sufficiency of the evidence is concerned. If the trial was without prejudicial error so far as the defendant is concerned, the judgment must be affirmed.

Appellant urges that his rights were prejudiced by the conduct of plaintiff's attorney in failing to notify defendant's attorney of the time when the case would be reached for trial in time for him to be present at the trial, as he agreed to do, as claimed by defendant. What the plaintiff's attorney did agree to do concerning such notification is a matter of dispute. The attorneys do not agree as to the facts, and, as they rest in parol, this court will not attempt to determine what the facts are. The matters in controversy transpired mostly in the presence of the trial court. That court, under its own knowledge of the facts, and with the affidavits of the parties before it relating to the disputed facts, denied the motion for a new trial, and thereby decided the disputed questions of fact adversely to appellant's contention. Under the circumstances, we shall be controlled by the finding of the trial judge on this matter. We will say, however, that the case, when called for trial, was the last jury case on the calendar; that there was no formal motion for a continuance on the ground that defendant's counsel was absent and had not been notified by plaintiff's counsel; that Mr. Bosard was employed by defendant to try the case when it became known that Mr. Skulason, his attorney of record, could not be present for immediate trial. After a jury was impanelled, Mr. Bosard suggested that further proceedings ought to be postponed until the next day, on account of Mr. Skulason's absence; giving as his reason that the witnesses would testify through an interpreter in a foreign language, not familiar to him, but familiar to Mr. Skulason. The examination of two witnesses proceeded so far as their direct examination was concerned. On request of Mr. Bosard, their cross-examin-

ation was deferred until the next day, when Mr. Skulason expected to be present. On the morning of the next day a court case was taken up, and the case at bar passed until Mr. Skulason could be present. Through some misunderstanding at Grand Forks as to the train being three hours late, Mr. Skulason failed to appear, but the trial did not proceed until after the train arrived at Pembina, where the case was on trial. If it should be conceded that plaintiff's attorney had agreed to notify Mr. Skulason when the case would be called, and had failed to do so, the absence of Mr. Skulason at the trial was not attributable to that fact. Except as to the examination in chief of two witnesses for plaintiff, he could have conducted the trial, and his absence cannot be properly charged to plaintiff's attorney. The further fact is also shown by the record that it is not claimed that mistakes were made at the trial. It is not attempted to be shown wherein the trial was not properly conducted. No fact is pointed out that could have been presented in a different or better manner. Nothing was omitted. The issue was a simple question of fact, not requiring special preparation for the trial. It is not hinted that the trial could have been conducted with better chances of succeeding, had the regular attorney been present. The mere fact that the regular attorney is familiar with the language in which the witnesses gave their testimony is of no weight whatever as a ground for granting a new trial because of his absence at the trial, under the circumstance of this case. The motion was properly denied, so far as this ground is concerned, both upon the ground that no prejudice is shown to have resulted from the attorney's absence, and that such absence was not caused by the conduct of plaintiff's attorney. *Caughey v. N. P. El. Co.*, 51 Minn. 324, 53 N. W. 545; *Spelling on New Trials*, section 190; *Adamek v. Plano Mfg. Co.*, 64 Minn. 304, 66 N. W. 981; *Reynolds v. Campling*, 23 Colo. 105, 46 Pac. 639; *Moulder v. Kempff*, 115 Ind. 459, 17 N. E. 906.

The defendant claims that a new trial should have been granted on the ground of the unexpected absence of a material witness who suddenly became ill and was unable to attend. The witness was not subpoenaed, but promised on the day of trial that he would attend as defendant's witness. He now makes affidavit that he would have attended as such witness, had sickness not come on. The defendant knew that he was sick before the trial was resumed on the second day, and made no motion for a continuance. It is claimed that the circumstances present a case of "accident and surprise which

ordinary prudence could not have guarded against," and therefore are grounds for a new trial, under subdivision 3 of section 5472, Rev. Codes 1899. We do not agree with counsel in their contention. A case of accident or surprise under said section cannot arise unless the party asking for a new trial has been diligent. *Gaines v. White*, 1 S. D. 434, 47 N. W. 524. If ordinary caution would have prevented the situation from which relief is asked, the new trial should be denied. The party must himself be blameless. The situation must not be attributable to his negligence. By making a motion for a continuance after discovery of the witness' sickness, a continuance might have been granted, or the witness' testimony admitted by consent of the plaintiff. To rely on his promise to attend as a witness is not exercising ordinary diligence as a general rule. *Clouston v. Gray*, 48 Kan. 38, 28 Pac. 983; *MacKubin v. Clarkson*, 5 Minn. 247 (Gil. 193); *Day v. Gelston*, 22 Ill. 102; *Frank v. Brady*, 8 Cal. 47; *Moore v. Goelitz*, 27 Ill. 18; *Langener v. Phelps*, 74 Mo. 189; *Foster v. Hinson*, 76 Iowa, 714, 39 N. W. 682; *Yori v. Cohn* (Nev.) 67 Pac. 212; 4 Enc. Pl. & Pr. p. 862, and note 12, and cases cited. Ordinary diligence was not exercised in not moving for a continuance when it became known that the witness was unable to attend. By not making a motion for a continuance, the defendant cannot properly claim on a motion for a new trial that he could not have guarded against the surprise occasioned by the witness' absence. Litigants should place themselves in a position where attendance can be compelled by process, and, if they do not do so, they will not ordinarily be permitted to successfully urge the failure of witnesses to attend as ground for a new trial. See the following cases: *Gee v. Moss*, 68 Iowa 318, 27 N. W. 268; *Lincoln v. Staley*, 32 Neb. 63, 48 N. W. 887; *Harrison v. Langston*, 100 Ga. 394, 28 S. E. 162; *Mayer v. Duke*, 72 Tex. 445, 10 S. W. 565; *Peck v. Parchen*, 52 Iowa, 46, 2 N. W. 597; *Swenson v. Aultman*, 14 Kan. 273; *Clouston v. Gray*, 48 Kan. 38, 28 Pac. 983; *Langener v. Phelps*, 74 Mo. 189; *Foster v. Hinson*, 76 Iowa, 714, 39 N. W. 682; *Moulder v. Kemff*, 115 Ind. 459, 17 N. E. 906; *Davis v. Walker*, 7 W. Va. 447; *Quincy Whig Co. v. Tillson*, 67 Ill. 351; *Eiche v. Taylor*, 17 Minn. 172 (Gil. 145); *Roach v. Colbern*, 76 Mo. 653. In motions for a new trial on such grounds as are here presented, the trial court is vested with a wide discretion, and its action will not be disturbed except in case of manifest abuse of the same. See cases just cited,

and *Hughes v. Richter*, 161 Ill. 409, 43 N. E. 1066; *McLear v. Hapgood*, 85 Cal. 557, 24 Pac. 788. The defendant should have moved for a continuance, and, not having done so, he does not bring himself within the provisions of subdivision 3 of said statute.

The appellant assigns as error that his objections to questions put by plaintiff to his witnesses as leading were erroneously overruled, and that plaintiff's objections to defendant's questions to plaintiff's witnesses on cross-examination were erroneously sustained. These objections relate to several questions. We have carefully considered such objections. No useful purpose would follow repeating the questions here. In no case does it appear that a leading question objected to was followed by an answer containing evidence of facts that were not substantially in evidence before. One question will illustrate the manner in which the leading questions were asked, as follows: "This money was then paid to Sigfusson to be paid to the plaintiff in this case?" The witness had previously testified that he had paid the money to Sigfusson, and requested him to pay it to the plaintiff, and such answer was elicited by questions not leading. The question objected to was objectionable, but to allow it was not reversible error. The witnesses were examined through an interpreter, and the trial judge had a wide latitude of discretion, which was not exercised in a manner prejudicial to defendant's rights, nor in a manner not allowed under the ordinary rules relating to examination of witnesses. *White v. White*, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799; *Funk v. Babbitt*, 156 Ill. 408, 41 N. E. 166; *Kohler v. Ry. Co.*, 99 Wis. 33, 74 N. W. 568; *State v. Chee Gong*, 17 Or. 635, 21 Pac. 882; *Blakeman v. Blakeman*, 31 Minn. 396, 18 N. W. 103; *Rainey v. Potter*, 120 Fed. 651, 57 C. C. A. 113; *Carlson v. Holm* (Neb.) 95 N. W. 1125; *Pittsburg Ry. Co. v. Kinnare* (Ill.) 67 N. E. 826.

The objection that the defendant's attorney was restricted in his cross-examination did not result in excluding any fact concerning which cross-examination was attempted. The facts concerning which the inquiry was made had been testified to. Under the wide latitude allowed on cross-examination the rulings were perhaps too restricted, but to grant a new trial for this reason would be unwarranted, as there is no pretense or claim that a material fact was excluded that was not already in evidence.

The judgment of the district court is affirmed. All concur.
(100 N. W. 703.)

J. J. HOGEN v. TOSTEN T. KLABO.

Opinion filed August 2, 1904.

In Pleading a Counterclaim Averments of Complaint Are Admitted.

1. New matter constituting a defense or counterclaim must be set forth in the answer to admit evidence of it. The new matter of the Codes admits that all the material allegations of the complaint are true, and consists of facts not alleged therein which destroy the right of action and defeat a recovery.

Witness — Cross-Examination.

2. The rule that a party who has not opened his own case will not be permitted to introduce it to the jury by cross-examination of the witnesses of the adverse party applies to such matters as the examining party has pleaded affirmatively as a defense or counterclaim, and does not apply when a defendant, on cross-examination of the plaintiff's witness, simply aims to disprove by the witness the case which the witness himself has made

Pleading — General Denial.

3. The distinction between defenses admissible under a denial and those which are new matter depends primarily upon the structure of the complaint and the material averments of fact therein. All facts which directly tend to disprove any one or more of these averments, or to show that plaintiff never had a cause of action, may be offered under the general denial.

Objection Must Be Made to Question When Asked — Motion to Strike Out Answer.

4. A party cannot sit by and permit an incompetent or improper question to be asked without objection, and, when he finds the answer is against him, move to strike out the answer.

Cross-Examination.

5. A cross-examination is proper though it calls for facts not testified to on direct examination, but relating to the same subject-matter and bearing upon the main fact toward which the examination in chief was directed—facts which give to the direct testimony the effect of false testimony.

Appeal from District Court, Steele county; *Pollock*, J.

Action by J. J. Hogen against Tosten T. Klabo. Judgment for defendant, and plaintiff appeals.

Affirmed.

Asa J. Styles and Theodore Koffel, for appellant.

Indebtedness of stranger not material. 7 Am. & Eng. Enc. Law (2d Ed.) 78.

Self-serving statements are inadmissible. *Boston & A. R. Co. v. O'Reilly*, 158 U. S. 334, 15 Sup. Ct. Rep. 830; *Smith v. Tosini et ux.* 48 N. W. 299; *Reagan et al. v. McKibben*, 76 N. W. 943; *Cain v. Cain*, 21 Atl. 309; *Smith v. Eyre*, 28 Atl. 1005; *Pinney v. Jones*, 30 Atl. 762; *Osmun v. Winters*, 35 Pac. 250; 9 Am. & Eng. Enc. Law, (2d Ed.) 5.

The case is not within the rule that courts will not review conflicting evidence. There is no conflicting or inconsistent evidence, and the rule in *Flath v. Casselman*, 10 N. D. 419, 87 N. W. 988, does not apply. There is no substantial conflict, and the correctness of the verdict is a question of law. *Mitchell v. Reed*, 26 Pac. 342.

F. W. Ames and *George Murray*, for respondent.

Respondent could only meet appellant's proof—by himself and Nelson—that Hogen was owner of the machine, by circumstantial evidence. If circumstantial evidence forms a link in the chain of proof, or tends reasonably to establish the fact in controversy by strengthening the probabilities on one side or weakening those on the other, it should be received. *Gandy v. Bissell's Estate*, 90 N. W. 883, *Black v. Walker*, 7 N. D. 414, 75 N. W. 787.

The court will not weigh conflicting evidence, nor modify an order allowing or denying a new trial where there is a substantial conflict in the evidence. *Flath v. Casselman*, 10 N. D. 419, 87 N. W. 988; 14 Enc. Pl. & Pr. 769; *Lighthouse v. Chicago, M. & St. P. Ry. Co.*, 54 N. W. 320.

The admission of incompetent evidence upon a conceded fact in the case, if error, is without prejudice. *Gale et al. v. Shillock et al.*, 29 N. W. 661; *Ostrand v. Porter*, 25 N. W. 731; *Stewart v. Gregory, Carter & Co.*, 9 N. D. 504, 84 N. W. 553. The admission of improper evidence, where the testimony has been received elsewhere without objection, is harmless. *Ashley v. Sioux City*, 93 N. W. 303.

Objections not sufficiently stating the grounds thereof cannot place the court in error. *Kolka v. Jones*, 6 N. D. 461, 71 N. W. 558.

Where an objection is overruled, and the question is asked in cross-examination by the same party, any error in overruling the objection is cured. *Ashley v. Sioux City*, *supra*; *Little Dorrit Gold Mining Co. v. Arapahoe Gold Min. Co.*, 71 Pac. 389.

COCHRANE J. Plaintiff sued to recover a balance which he claimed to be due him for threshing defendant's crops in 1901. In his complaint plaintiff alleged that he made a contract with and was employed by defendant to thresh defendant's crops for 1901; that he threshed the crops pursuant to the contract; and that there was a balance due him and unpaid upon said contract of \$365.37, for which he asks judgment. The answer is a general denial. A verdict was returned for defendant. A motion for new trial was denied, and this appeal is from the order denying a new trial.

There is some conflict in the evidence, but the following facts are established without contradiction: In July, 1901, A. L. Nelson represented to defendant that he had purchased a threshing rig for use during the fall. Defendant had a large crop, and he was desirous of securing the job of threshing it because of the economies of operation upon defendant's farm and for the prestige it would give him in securing contracts from neighboring farmers. Nelson was insolvent, and without credit. He owed defendant for the amount of a note upon which defendant had become his surety and subsequently paid, and defendant was at that time surety for him upon another note then past due. After some negotiation, a contract was made by which Nelson agreed to thresh defendant's grain with his machine at a stipulated price per bushel, the gross amount to be discounted \$100, and defendant claimed (but this is denied by Nelson) that the amount Nelson owed him and the amount of the note upon which he was surety, and which he was to pay, should also be paid by this threshing deal. Subsequently, and in the months of September and October, Nelson came upon defendant's farm with a threshing rig, which he claimed to own, and threshed defendant's crops. On or about the 8th of November, and after the threshing was completed, Nelson requested defendant to pay what was coming under the contract to the plaintiff, Hogen. Defendant paid \$220.40, claiming this to be the balance due for the threshing after deducting the \$100 discount, a freight bill upon the rig, advanced by defendant, and the notes he had taken up for Nelson. Hogen then for the first time asserted that the threshing machine belonged to him, and not to Nelson; that Nelson was his hired man or agent, and all that Nelson had done in making the contract and performing it was for plaintiff's benefit; and he demanded payment of the full amount the threshing came to without any deductions excepting the freight bill upon the separator.

Defendant had dealt with Nelson at all times as the principal. If we treat plaintiff as an undisclosed principal seeking to recover upon a contract made by the agent for his benefit, he has no other or further rights in this litigation than Nelson would have had had the action been brought in his name. "It would be wrong and fraudulent for the principal to keep himself concealed, permit his agent to make and perform a contract in his own name, and then, by disclosing himself, reap all the advantages and profits of the contract to the disadvantage of the other who had traded with the agent as the only person interested in the transaction." Paley on Agency, 326; Mechem on Agency, section 773; *Violett v. Powell*, 52 Am. Dec. 550; *Taintor v. Pendergast*, 3 Hill, 72; *Ruiz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618; *Ilseley v. Merriam*, 7 Cush. 242, 54 Am. Dec. 721; *Judson v. Stillwell*, 26 How. Prac. 513. This is, in effect, the declaration of our statute. Section 4338, Rev. Codes 1899. Defendant is entitled to the full benefits of every stipulation in the contract upon which plaintiff bases his right of recovery. The denials of the answer put in issue the averment that he had a contract with defendant for threshing, or that he threshed for defendant, or that defendant was indebted to him for the balance claimed, or in any sum or amount. The burden was cast upon plaintiff to prove the contract under which the threshing was done, and that at the time the contract was made and at the time it was performed Nelson, who conducted the business and performed the work, was in fact his agent, and acted as such in the transaction. Defendant tried the case upon the theory that plaintiff's claims were entirely false, and that Nelson was the real party in interest.

Several assignments of error are predicated upon rulings of the court admitting evidence upon the cross-examination of plaintiff's witness, Nelson, identifying notes which defendant had signed and subsequently paid for him, and questions as to whether, under his contract with defendant, these notes were to be paid in threshing. Nelson was the witness upon whose testimony plaintiff relied to prove the contract upon which his right of recovery, if any, was based. Defendant was entitled to have all the terms of the contract proven, and to call the attention of the witness, by cross-examination, to any terms of it he had inadvertently or designedly omitted in his examination in chief. 3 Enc. Ev. 835, and notes; 8 Enc. Pl. & Pr. 105, and note; *Duttera v. Babylon* (Md.) 35 Atl. 64; *Wilson v. Wagar*, 26 Mich. 452. Defendant claimed that it was a stipulation

of this contract with Nelson that he was to pay his indebtedness to defendant by threshing. The verdict of the jury establishes the verity of defendant's claim that this was a part of the contract. It was proper for the defendant, in cross-examination, to have this witness identify the notes which defendant had signed for him, and to enquire whether the contract embraced the payment of defendant for what he had and would be required to expend in retiring them, and to show that in arriving at the balance claimed to be due for the threshing no deduction had been made for these notes. This cross-examination was competent as tending to show that the balance sued for was fictitious, and without legal basis. It was not objectionable as tending to establish new matter, which, under the rules of pleading, should be affirmatively pleaded. *Brooke v. Quynn*, 13 Md. 379-391; *Granger v. Raybarild*, 38 Eng. Ch. 94. Where a defendant sets up a defense not necessarily involved in the denial of plaintiff's case, but consisting of new matter, then the defendant must wait until after his opening before he offers proof of this new matter; but when all the defendant, on cross-examination, wishes to disprove by the plaintiff's witness, is the very case the witness has made, then the rule is different, and the cross-examination is proper. *Wendt v. Railway Co.*, 4 S. D. 476, 57 N. W. 226; *Jackson v. Water Co.*, 14 Cal. 19.

Several rulings of the court are assigned for error in permitting defendant to testify concerning the terms of the contract, under which his threshing was done and identifying the Nelson notes, which were paid in threshing under this contract. Appellant insists that this was new matter, constituting a defense or counterclaim, and that evidence of it could not be received under a general denial. This evidence was directly contradictory of the material averments of the complaint, and was consequently competent. The fact that it would tend to prove a counterclaim, had one been pleaded, does not effect its competency for the purpose indicated. We do not think, however, that this evidence was of "new matter constituting a defense or counterclaim," within the meaning of subdivision 2, section 5273, Rev. Codes 1899. New matter means matter extrinsic to the matters set up in the complaint as a basis of the cause of action; a defense which concedes that a cause of action once existed, but has been determined by some subsequent transaction. *Manning v. Winter*, 7 Hun. 482; 1 Enc. Pl. & Pr. 830; *Greenway v. Jones*, 34 Mo. 328; *Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692; *Churchill*

v. Baumann (Cal.) 30 Pac. 770. The new matter of the Codes "admits that all the material allegations of the complaint are true and consist of facts not alleged therein which destroy the right of action and defeat a recovery. * * * The distinction between defenses admissible under a denial and those which are new matter depends primarily upon the structure of the complaint and the material averments of fact which it contains. All facts which directly tend to disprove any one or more of these averments may be offered under the general denial. All facts which do not thus directly tend to disprove some one or more of these averments, but tend to establish a defense independently of them, cannot be offered under the denial. They are new matter, and must be specially pleaded." Pomeroy's Rem. & R. Rights, section 673. See, also, *Gilbert v. Cram*, 12 How. Prac. 455; *Mauldin v. Ball* (Mont.) 1 Pac. 409; *Stoddard v. Conference*, 12 Barb. 573; *Evans v. Williams*, 60 Barb. 346. Tested by this rule, the evidence was not of new matter. It does not concede the material allegations of the complaint to be true, but tends to show an entirely different contract from that declared upon, made with another and different party from that alleged, and it refutes the allegation as to the amount of unpaid balance, if any there was. These facts are inconsistent with and contradictory of the material allegations of the complaint. The effect of such proof was to show that plaintiff never had a cause of action, and this can always be shown under a general denial. *Hoffman v. Parry*, 23 Mo. App. 21; *Evans v. Williams*, 60 Barb. 346; *Churchill v. Bauman* (Cal.) 30 Pac. 770; *Northrup v. Ins. Co.*, 47 Mo. 435, 4 Am. Rep. 337; *Greenway v. James*, 34 Mo. 328; *Meredith v. Mining Co.*, 56 Cal. 178; *Bridges v. Paige*, 13 Cal. 641; *Greenfield v. Ins. Co.*, 47 N. Y. 437; *Weaver v. Barden*, 49 N. Y. 286; *Griffin v. Railway Co.*, 101 N. Y. 348, 354, 4 N. E. 740; Pomeroy's Rem. sections 670, 671. The rule is well illustrated in *Schermerhorn v. Van Allen*, 18 Barb. 29, where an attorney sued to recover for professional services. The complaint stated the retainer, the services, and their value. The answer was a general denial. Plaintiff proved the services, and gave evidence showing their reasonable value. The Court said: "It was surely competent for the defendant, under a general denial of such indebtedness, to prove that he never incurred nor owed the debt. He had a right to prove that the services were rendered as a gratuity, either as to the whole or in part; that the plaintiff had himself fixed a less price

for their value than he claimed to recover. The services being proved, the defendant might show that they were rendered not for him, but on the credit of some other person, or that the plaintiff undertook to limit the risk of the litigation. It was not an attempt to show an extinguishment of the alleged indebtedness by payment, release, or otherwise, but it was an offer to show that such indebtedness never existed. The defendant was at liberty to prove any circumstances tending to show that he was never indebted at all, or that he owed less than was claimed." In *Hawkins v. Borland*, 14 Cal. 413, plaintiff alleged that defendant was indebted to him for cattle sold and delivered. Answer, a general denial. The property was sold by Jesse Hawkins, another than plaintiff, and the question was involved on the trial whether these cattle were the property of Jesse or of the plaintiff. He asked a witness to state the terms of the contract with Jesse Hawkins. This was objected to on the ground that the answer did not set up this new matter. The court said: "The plaintiff was bound to make out his contract substantially as he stated it. The defendant denied the contract as plaintiff stated it. It was not new matter to prove his denial in this way. It was only proving the issue on his part." In *Manning v. Winters*, 7 Hun. 482, it is said: "Where a plaintiff shows a part of a transaction or contract, or gives evidence sufficient in respect to it to authorize a verdict or to imply a contract, the defendant must be entitled to prove the whole transaction under his general denial, and to show that the plaintiff has no cause of action. Evidence simply directed to repel a presumption or to show an express contract to displace an implied one set up and proved is not evidence to prove new matter." The evidence was properly received.

Appellant complains that he was required to testify in cross-examination that Nelson was insolvent, and his credit was not good for \$75. It appeared in the case that Nelson, about two weeks after contracting to do defendant's threshing, attempted to borrow from him \$75 to pay freight upon the machine he claimed to have purchased through plaintiff, the amount to be repaid in threshing. Defendant was assured by plaintiff that Nelson could not get the machine unless the freight was paid. Defendant indorsed a note for Nelson in the Bank of Hatton for the amount of this freight money, and notified plaintiff he could get the money when Nelson's machine arrived. Plaintiff got the money, and defendant subsequently paid this note. Plaintiff testified upon direct examination

that Nelson never bought the machine, but that Nelson in all these transactions was acting for him; that he hired Nelson, for \$1.50, to borrow this money from Klabo, and to relend it to him. In the light of these disclosures it was fair to show the insolvency of Nelson; that he was wholly without credit; and that plaintiff knew it, and would not himself trust him for this amount. Such matters went to the credibility of plaintiff and his claims. To hire a worthless person, without credit, to borrow money, when to do so would necessitate the making of false representations to the lender, displayed a moral delinquency on the part of plaintiff and his witness Nelson in the transaction which the jury were entitled to know in measuring the truth of plaintiff's claim that he was the owner of the machine and that Nelson was the agent. Nelson's insolvency suggested the extreme improbability of plaintiff's story, and that it was made up to counteract the proofs in the case that Nelson had paid the freight upon this machine. The object of cross-examination is to break or weaken the force of the testimony given by the witness on his direct examination. To this end it is always proper to show the relations of the witness to the case and the parties; the interest he may have, if any, in the result; his motives for testifying in any particular manner; and likewise, to show his relation to the facts. *State v. Kent*, 5 N. D. 541, 67 N. W. 1052, 35 L. R. A. 518. Within the subject-matter of the direct examination free range is permitted in cross-examination of an adverse party. It should not be limited to the exact facts stated in the direct examination, but may extend to the other matters which tend to limit, explain, or qualify them, or to rebut or modify any inference resulting therefrom, provided they are directly connected with the matter stated in the direct examination. A cross-examination is proper though it calls for particular facts not called for on the direct examination, if they relate to the same subject-matter and bear upon the same main fact to which the whole examination in chief was directed; facts, the omission to state which gave to the direct testimony the injurious effect of false testimony. *Campau v. Dewey*, 9 Mich. 381; *Ah Doon v. Smith* (Or.) 34 Pac. 1093; *Sayres v. Allen* (Or.) 35 Pac. 254; 3 Enc. of Ev. 832. The inquiries were proper, and within the rule stated.

Other assignments relate to objections to evidence where the grounds of objection were not sufficiently stated, or to motions to strike out evidence where the grounds of objection were apparent

when the evidence was received and the objections were not seasonably made. *Kolka v. Jones*, 6 N. D. 461, 480, 71 N. W. 558, 66 Am. St. Rep. 615; *Wendt v. Railway Co.*, 4 S. D. 484, 57 N. W. 226; *Way v. Johnson*, 5 S. D. 237, 58 N. W. 552; 1 *Rice on Evidence*, 517; *Quin v. Lloyd*, 41 N. Y. 349; in *re Morgan*, 104 N. Y. 74, 9 N. E. 861; *People v. Chacon*, 102 N. Y. 669, 6 N. E. 303; *Hickman v. Green* (Mo. Sup.), 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 43.

The verdict returned is in accord with and justified by the evidence. The order denying a new trial is affirmed. All concur. (100 N. W. 847.)

WILLIAM E. PURCELL AND E. A. DIVET v. THE FARM LAND COMPANY AND MIDDLESEX BANKING COMPANY.

Opinion filed August 5, 1904.

Under Chap. 67, Laws 1897, Judgment May Be Rendered Notwithstanding the Taxes Are Paid.

1. Under chapter 67, p. 76, Laws 1897, pertaining to obtaining judgments against specific tracts of land to enforce payment of taxes against the owner, the jurisdiction of the court to enter judgment against a particular tract appearing on the list filed with the clerk as unpaid is not affected by the fact that all taxes against the owner and against the tract had been previously paid.

Stipulation That Judgment Was "Duly Entered," Implies Regularity of All Jurisdictional Acts.

2. A stipulation of facts under which an action is submitted for decision which recites that judgment was duly entered in a certain action, and that a certain sale was made on notice duly given, will warrant a finding that all jurisdictional acts necessary to sustain the judgment were performed, and that all acts constituting notice of sale were done and performed as required by law.

Appeal from District Court, Sargent county; *Cowan, J.*

Action by William E. Purcell and E. A. Divet against the Farm Land Company and the Middlesex Banking Company. Judgment for plaintiffs, and defendants appeal.

Affirmed.

George H. Fay and *W. S. Wickersham*, for appellants.

The defendants and appellants had paid their taxes and received their receipts from the proper officer of the county; they had done

all the law asked of them, and had perfect right to expect the proper record would be made by such officer and that the title to said land would appear clear from such claims on the record.

The law will not aid or permit an individual to take advantage of his own wrong; a county has no greater right under the law than an individual, and could not proceed, after having received the taxes by its proper officers, to take advantage of the wrong and cause an innocent party to suffer therefor. The sale was invalid and void because no notice of it was given as required by the law under which the sale was made. The same was published once each week for two successive weeks in the proper newspaper, and no further publication was made. Section 12 of chapter 67, Laws of 1897, provides that sheriffs shall give notice by posting one copy in the office of the clerk where the judgment shall have been entered, and one in the office of the treasurer, and one at the county seat in some conspicuous place, at least ten days before the sale, and by publishing such notice once in each week for two successive weeks in some newspaper of general circulation, the last publication to be ten days before the day of sale. The notice of sale was published two successive weeks in the proper newspaper, but no further notice was given by posting as required by law, in connection with the publication. No notice being given, the sale is void, and the county acquired no title to the land by such sale. No proofs of any kind of the publication of the notice and list were ever furnished to the clerk of the district court before or after entering the judgment. The case of *Emmons County v. Thompson et al.*, 9 N. D. 598, 84 N. W. 385, does not apply, because it does not appear from the agreed facts, that the affidavit and copies of the paper or either of them were on file when the judgment was entered, or were ever filed, and consequently it does not appear that the clerk of the district court had authority to enter the judgment at the time that he did; and such case does not apply because there were taxes due and unpaid against the land in controversy in that case, where in the case at bar there were no taxes due and unpaid and the county had no claim or cause of action against the land in question.

The defendants and appellants now are, and have been continuously since January 23d, 1885, in the quiet and peaceable possession of the land in question, and Sargent county never has had such possession or received the rents and profits from the land.

Under the rule laid down in *Galbraith v. Payne*, 12 N. D. 164, 96 N. W. 258, and *Schneller v. Plankinton*, 12 N. D. 561, 98 N. W. 77, a conveyance of title to real estate by a grantor who has not been in possession or taken rents for a space of one year prior thereto, which real estate is held adversely by claim of title, is void, and the conveyance by Sargent county to the plaintiff and respondent is absolutely void.

Purcell, Bradley & Divet, for respondents.

When a taxpayer has been cited and had his day in court, he cannot attack the judgment collaterally. 2 *Desty on Taxation*, 727; *Jaggard on Taxation*, 434; 2 *Dembitz on Land Titles*, 1336.

It is the policy of the law that every defect or objection to the enforcement of the tax appearing on the list should be litigated in the proceeding. *St. Paul & Duluth Ry. Co.*, 6 N. W. 454; *Chauncey v. Wass*, 25 N. W. 457; same on rehearing, 30 N. W. 826; *Emmons County v. Lands of First Nat'l Bank of Bismarck*, 9 N. D. 583, 84 N. W. 379; *Emmons County v. Thompson*, 9 N. D. 598, 84 N. W. 385.

The fact of payment of the tax cannot be cited to defeat the judgment. *Mayo v. Foley*, 40 Cal. 281; *State v. Sargent*, 18 Mo. App. 228; *Wilkins v. Keith et al.*, 79 N. W. 887.

Jurisdiction of the land is acquired by the fact of publication, not the proof of it. *Emmons County v. Thompson*, 9 N. D. 598, 84 N. W. 385; *Hoyt v. Clark*, 66 N. W. 262; *Frick et al. v. Reigelman*, 43 N. W. 1117; *So. Cal. Fruit Exchange v. Stamm*, 54 Pac. 345; *Commissioners v. Morrison*, 22 Minn. 179.

Section 15, of chapter 67, Laws of 1897, clothes the judgment with all the presumptions which attach to any judgment, and throws upon the party alleging its invalidity to affirmatively establish the want of jurisdiction. This cannot be done by the silence of the record; but where the latter fails to speak, every intendment and presumption are in favor of the jurisdiction. *Freeman on Judgments*, section 124, and cases cited; *Hoyt v. Clark*, 66 N. W. 262; *Hahn v. Kelly et al.*, 34 Cal. 391; *Holmes et al. v. Campbell*, 12 Minn. 221 (Gil. 141); *Dean v. Thatcher*, 32 N. J. L. 47.

The stipulation that a judgment is "duly" entered concedes a valid and regular judgment, and forecloses all questions of the regularity of the proceedings. The word "duly," in connection with the entry of a judgment, has acquired in law a special sig-

nificance, and by the use of that word, all jurisdictional statements necessary are implied. 11 Enc. Pl. & Pr. 1137-1138; *Hunt v. Dutcher*, 13 How. Pr. 538.

Section 7002, Rev. Codes, and *Galbraith v. Paine*, 12 N. D. 164, 96 N. W. 258; and *Schneller v. Plankinton*, 12 N. D. 561, 98 N. W. 77, have no application because such section does not apply to sheriffs' and tax deeds. The objection that the printer's affidavit was not filed in time is barred by the statute of limitations. Section 15, chapter 67, Laws of 1897.

What the legislature might have dispensed with in the first instance, and still have a valid proceeding under the constitution, it may, by a curative act in the shape of a statute of limitation, declare no longer of importance. *Fisher v. Betts*, 12 N. D. 197, 96 N. W. 132; *Meldahl v. Dobin*, 8 N. D. 115, 77 N. W. 280; *Roberts v. First Nat. Bank of Fargo*, 8 N. D. 504, 79 N. W. 1049; *Sweigle v. Gates*, 9 N. D. 538, 84 N. W. 481; *Ensign v. Barse*, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401; *Ruggles v. County of Fond du Lac*, 23 N. W. 417; *Milledge v. Coleman*, 2 N. W. 77.

MORGAN, J. Plaintiffs instituted this action to determine adverse claims to the north half of the southwest quarter of section 2, township 129, range 55, in Sargent county, N. D., and allege their absolute ownership of such land, and that the defendants claim an interest or estate therein, or liens thereon, adverse to plaintiffs' title; and they pray that defendants be required to set forth their claims to such land, and that they be adjudged null and void, and that plaintiffs' title be quieted as to such claims, and that defendants be barred from asserting any further claims to said land. The defendants answered, setting forth their title to said land, and claiming ownership thereof by virtue of a sheriff's deed issued to them under a valid foreclosure of a mortgage, and further alleged that all taxes upon said land had been fully paid. The plaintiffs, by a reply, set forth that they are the owners of said land by virtue of the following proceedings, to wit: That in the year 1897 the taxes on said land had become delinquent, and that said county did thereafter, by its regular officers, take all the steps prescribed by chapter 67, p. 76, of the Laws of 1897, to procure a judgment against said land for such delinquent taxes, and judgment for such taxes was on December 29, 1897, duly entered against said land for such taxes, and that said land was thereafter regularly and legally sold under and by virtue of said judgment after due notice

of such sale had been given, and a certificate of sale duly issued to the county upon such sale, and that no redemption was ever made from the sale, and that plaintiffs became the owners of said land by virtue of conveyances from Sargent county on January 28, 1902. The cause was submitted to the court at the trial upon stipulated facts as follows: That the defendants have title to the land in question unless the same has been cut off by the judgment and subsequent sale as set forth in plaintiffs' reply; that plaintiffs are the owners of said land unless all proceedings by the county under chapter 67, p. 76, Laws 1897, were void by reason of the fact that all taxes on said land had been fully paid before any proceedings were taken by said county under said chapter; that judgment was duly entered for said taxes, and all the steps prescribed by said chapter for the recovery of judgment were duly taken as prescribed by said chapter; that due notice of the sale of said land was given, as prescribed by law; that notice of the time when the period of redemption from the sale under such judgment would expire was duly given. The trial court rendered judgment as prayed for by the plaintiffs, and adjudged them to be the absolute owners of said land. Defendants appeal to this court from said judgment, and request a review of all the issues, under section 5630, Rev. Codes 1899.

Appellants contend that the judgment should be reversed for the following reasons: (1) No taxes being due or delinquent on said land when the proceedings were commenced and judgment rendered and the sale made under said chapter 67, the court had no jurisdiction of the subject-matter of the action, and all such proceedings were void. (2) That the sale was void for the reason that no notice thereof was given as required by law. The specific objection under this contention is that no notice of such sale was posted as required by said chapter 67, and that publication of notice is not sufficient. (3) That no proof of the publication of such tax list was filed with the clerk of the district court before judgment was entered by the clerk. (4) That the deed to the plaintiffs from Sargent county is void under section 7002, Rev. Codes 1899, and the rule laid down by this court in *Galbraith v. Paine*, 12 N. D. 164, 96 N. W. 258, and in *Schneller v. Plankinton*, 12 N. D. 561, 98 N. W. 77.

Defendants' principal contention is that the judgment was rendered without jurisdiction of the subject-matter of the action, and

was therefore void, as the tax on which the judgment was rendered had been fully paid, and was not a delinquent tax at any time. The judgment was a judgment by default. Defendants never appeared in the action. The list of delinquent taxes filed with the clerk of the district court, and published, showed delinquent taxes upon the lands in question. As a matter of fact, however, such taxes had been fully paid, but appeared upon the list as unpaid through the carelessness of the officials. The fact that such taxes had been paid before any proceedings were taken to recover judgment against the land constitutes the principal ground upon which defendants claim that the court had no jurisdiction to enter judgment.

Chapter 67, p. 76, of the Laws of 1897, provides, in detail, the procedure to secure judgment against lands, and for their sale for delinquent taxes on said lands for the year 1895 and prior years. It provides that filing a list describing such lands, stating their owner's name, the amount of taxes, penalty, and interest due, in the office of the clerk of the district court, by the county treasurer, shall have the effect of filing a complaint in an action by the county to enforce such taxes against each piece of land described in such list. It provides for a publication of such list, with a notice to the owners of the lands described to appear and answer, and, in default of answer, that judgment by default will be taken against such land for such taxes, interest, penalty and costs. It provides for a trial in cases where answers are filed, and further provides that "it shall always be a defense in such proceedings when made to appear by answer and proof that the taxes have been paid or that the property is lawfully exempt from taxation." It provides for rendering judgment by default or after hearing, and that the taxes found to be unpaid shall be a lien upon such lands, and that such lands shall be sold under execution to satisfy such judgment for said taxes after due notice of said sale has been given, and provides for issuing a certificate of sale to purchasers, and in cases where no person buys said lands at said sale, that the county treasurer shall bid in the land for the county or state. In short, chapter 67 is a complete law for the collection of taxes by proceedings against the land taxed. This law was before this court in *Emmons County v. Lands of First Nat. Bank*, 9 N. D. 583, 84 N. W. 379, and in *Emmons County v. Thompson*, 9 N. D. 598, 84 N. W. 385, where the law was held constitutional, and proceedings thereunder

considered, and their nature, effect, and validity passed upon. In those decisions the points raised in this case are, in effect, disposed of. It is there held that jurisdiction is obtained over the subject-matter of the proceeding by filing the list in the clerk's office, and its publication with the notice as herein required. It is also held in those cases that the action or proceeding is one strictly in rem—against the land. In the first-cited case, on page 595, 9 N. D., page 384, 84 N. W., the court says: "Having authority to adjudicate, it will follow that it may possibly erroneously adjudicate in some cases; and, in contemplation of such a contingency, the law points out methods of correcting errors which may be made in such cases. It is well settled that the jurisdiction of the court in this class of cases in no wise depends upon the validity of the tax proceeding involved, nor does it depend upon the taxability of the land against which the judgment is rendered." In that case it was not expressly decided that jurisdiction to render judgment would be sustained, as against collateral attack, in a case where the tax had been paid, although the list showed it as still unpaid. But that decision, in effect, holds that, in cases where jurisdiction exists, matters that could have been adjudicated in the original action or proceeding are deemed to have been adjudicated in that action or proceeding, and the fact that such matters were erroneously decided, or the fact that the evidence on which judgment was entered was false, cannot be set up to annul such judgment in a collateral proceeding. The fact that the tax on which the judgment was based had been fully paid could have been set forth in an answer filed in that suit or proceeding. To attack such judgment collaterally, however, is a different undertaking, and involves different principles. So far as the judgment is concerned, it is founded on regular proceedings as prescribed by the statute. The jurisdiction—that is, the right and power to try the issues—becomes absolute upon the filing of the list and the publication and giving of the notice prescribed by section 3 of the act. Upon these requirements being performed in accordance with this statute, in cases where no answers or objections are filed, the clerk has full power to enter the judgment; and such judgment is made final, by section 10, except in case of review by the Supreme Court. Considering the whole act together, it seems clear from it that the existence of an unpaid tax is not a fact that confers jurisdiction to proceed to judgment. The fact of delinquency is one of the facts to be litigated and determined before

judgment is entered. It is not the fact to be determined before jurisdiction attaches. Filing of the list and the publication confer jurisdiction. In theory, the delinquent tax is found to exist, even in default cases, before judgment can be entered, and in litigated cases it is found as an express fact when tendered as an issue before judgment is rendered against the land for the taxes. Therefore the fact of delinquency relates not to jurisdiction to proceed, but it is a fact to be found before judgment is entered. The defendants in this case were duly summoned to appear and answer as to any objections they might have against the rendering of judgment against the land for the tax. Not having appeared, and the statutory procedure having been strictly adhered to, the judgment is conclusive against them when attacked in a collateral proceeding, as this is. "The test of jurisdiction * * * is whether the tribunal has power to enter upon the inquiry, and not whether its conclusions in the course of it were right or wrong." *Van Fleet's Collateral Attack*, p. 82; *Colton v. Beardsley*, 38 Barb. 29. In *Williamson v. Mimms*, 5 S. W. 320, the Supreme Court of Arkansas said: "As to the fact of payment of the taxes being in itself a defense to the action, we think it was not available as such to the defendants, and evidence to prove the fact was wholly inadmissible. The decree of that court that the taxes had not been paid is conclusive upon the court and parties in this cause. It was a question proper for that court to decide, and the decision, if erroneous, could be corrected only upon a rehearing in that court, or upon appeal of the proceedings to this court." In *McCarter v. Neil*, 6 S. W. 731, the same court said, under a law similar to the law under consideration: "Such being the essential nature of the tax suit provided for by the overdue tax law, the jurisdiction of the court as to a particular tract was not affected by the fact that the taxes upon that tract had previously been paid. And since the objection does not go to the jurisdiction, the decree of the court condemning the land to sale is, so long as it stands unreversed, and not vacated or set aside, conclusive upon the point that the taxes were due." In *Mayo v. Foley*, 40 Cal. 281, the court said: "But the legality of the assessment in the first instance, and the fact of the delinquency in its payment, were the very questions made in the suit which resulted in the decree itself; and it was directly determined and adjudged therein that these taxes were legally levied, and were due and unpaid." The following cases sustain the same principle, in con-

struing statute substantially like ours: *Chauncey v. Wass*, 35 Minn. 1, 25 N. W. 457, 30 N. W. 826; *Seminary v. Gage* (C. C.) 12 Fed. 398; *Gaylord v. Scarff*, 6 Iowa, 179; *Knoll v. Woelken*, 13 Mo. App. 275; *McGregor v. Morrow* (Kan. Sup.) 21 Pac. 157; *Cadmus v. Jackson*, 52 Pa. 295; *County of Chisago v. Railroad Co.*, 27 Minn. 109, 6 N. W. 454; *Leigh v. Green* (Neb.) 90 N. W. 255; *Filkin v. Keith* (Mich.) 89 N. W. 887. See, also, *Van Fleet's Co. Attack*, pp. 606, 607. We therefore conclude that the jurisdiction of the clerk to enter the judgment against the land for the taxes shown to be unpaid by the list was not affected by the fact that such tax was in fact paid, and that such judgment was valid and binding as against this collateral attack.

The tax sale under the judgment is assailed on the ground that no notice of such sale was given as required by law. The ground of the objection is that there is no showing of notices of such sale having been posted, the proof showing publication only. This objection is fully met by the stipulation of facts, which recites that such sale was made on and after notice duly given in manner and form as prescribed by the statute. This language clearly imports that notice was given in every particular required under the law.

The next objection urged against the judgment is that the proof of publication of the delinquent list was not shown to be on file when the judgment was entered. In *Emmons County v. Thompson*, supra, this court said: "Jurisdiction of the land was acquired by the fact of publication, and not by the proof of that fact. In this case the affidavit was duly filed, but, if it had not been, the proof could have been supplied at any time during the pendency of the action." Further, the stipulated facts show that the judgment was duly entered. This is an admission that all jurisdictional acts required to be done before the judgment could be regularly entered were performed, and all provisions of the statute complied with. *Enc. Pl. & Pr.*, vol. 11, pp. 1137, 1138, and cases cited.

Appellants next contend that the conveyance from Sargent county to the plaintiffs is void under the provisions of section 7002, Rev. Codes 1899, as construed by this court in *Galbraith v. Paine*, supra, and *Schneller v. Plankinton*, supra. The claim is made that the stipulation shows that the defendants were in possession of these lands at the time that such conveyance was made, and that it is therefore void. This contention is not borne out by the stipulation. Nowhere is it therein stipulated that defendants were then in possession of

these lands. The answer alleges that they have been in such possession, but this allegation is denied by the reply. There is no proof in the record as to the possession of these premises at the date of such conveyance. If admitted, however, that defendants were then in possession thereof, the statute does not apply to conveyances made in pursuance of special proceedings at law, or those based upon or growing out of actions at law. There is nothing in the decisions cited on which a claim can be made that such conveyances as the one here involved are void as against possession. If such were the construction of section 7002, *supra*, it would nullify most proceedings for the collection of taxes or for the foreclosure of mortgages, and proceedings for securing title to land derived from sales under executions.

The judgment is affirmed. All concur.

(100 N. W. 700.)

NOTE—Under chapter 67, Laws of 1897, designation of a newspaper by improper name, renders publication of tax list void. *Cass Co. v. Security Improvement Co.*, 7 N. D. 528, 75 N. W. 775. Failure to file copy of resolution designating paper before publication of delinquent list, is fatal to publication. *Id.* Separate statement of penalty and interest not necessary. *Id.* In proceedings to obtain the judgment under chapter 67, Laws of 1897, failure of board of equalization to meet is not fatal to the tax, as full hearing is afforded the taxpayer under such chapter. *Wells County v. McHenry et al.*, 7 N. D. 246, 74 N. W. 241. Where there is no assessment or levy, no tax judgment can be rendered. *Wells County v. McHenry*, *supra*. There is no limitation of action to foreclose tax lien. *Wells County v. McHenry*, *supra*. Chapter 67, Laws of 1897, annuls all prior tax sales. *McHenry v. Kjdder Co.*, 8 N. D. 413, 79 N. W. 875. Sufficiency of treasurer's affidavit to list, and when list should be filed. *Emmons County v. Bank*, 9 N. D. 583, 84 N. W. 379. In actions brought under chapter 67, Laws of 1897, that owner of the land taxed was a nonresident, that clerk entered judgment without an order of the court, that a sufficient number of copies of newspaper containing the tax list were not filed with the clerk before entry of judgment, that there were fundamental defects in the original tax proceedings, are not grounds for vacating a judgment entered under said act. *Emmons County v. Thompson*, 9 N. D. 598, 84 N. W. 385. Jurisdiction to enter judgment under chapter 4, Laws of 1897, is given by the fact of publication of notice, not the proof of it. *Cruser v. Williams*, 13 N. D. 284, 100 N. W. 721. Under this chapter sheriff's certificate of sale is evidence of a lien only, until redemption. *Id.* Until proof of notice of expiration of period of redemption is filed, redemption period does not expire. *Id.* Burden of proving such notice and filing is on the person asserting title. *Id.*

STATE OF NORTH DAKOTA v. FRANK J. CRUIKSHANK.

Opinion filed August 27, 1904.

Information Is Sufficient.

1. The information in this case, although not in the language of the statute, is sufficient to charge the offense of attempting to shoot with intent to kill, defined in section 7115, Rev. Codes 1899.

Assault With Intent to Kill.

2. Sections 7115, 7145, Rev. Codes 1899, construed and *held*, that the class of acts described as "assault and battery" with any deadly weapon, etc., in section 7115, and by the term "assault or assault and battery" with any sharp or dangerous weapon, in section 7145, does not include an assault or assault and battery with firearms for the purpose of shooting.

Verdict — Sentence.

3. A verdict finding the defendant guilty of "assault with a dangerous weapon, with intent to do bodily harm," does not warrant a judgment and sentence for the felony defined in section 7145, Rev. Codes 1899, as an attempt to shoot with intent to do bodily harm.

Verdict — Evidence.

4. The verdict convicts the defendant of an assault only, and is sustained by the evidence.

Appeal from District Court, Cass county; *Pollock, J.*

Frank J. Cruikshank was convicted of assault, and appeals.

Reversed.

M. A. Hildreth, for appellant.

The verdict is a nullity because the jury did not find the character of the weapon used. *State v. Johnson*, 3 N. D. 150, 54 N. W. 547; *Ex parte An Cha*, 40 Cal. 426.

The offense of assault with a dangerous weapon with intent to do bodily harm was not made out: 1st. Because no assault and battery was charged; 2d, none was proven; 3d, under the proof defendant could not be found guilty of an offense that involved the element of intent at all. *Smith v. State*, 39 Miss. 521; *Lawson v. State*, 30 Ala. 14; *People v. Bransby*, 32 N. Y. 525. The state's attorney in his statement says, "When a man holds a loaded gun upon another and demands his money, the jury is entitled to draw the inference that he will kill him if he don't give him the money." The state's attorney must not get outside of the record and attempt to fortify his case by the assertion of facts unsupported by the

evidence. The above statement is outside of the evidence and clearly prejudicial and constitutes reversible error. *State v. McGahey*, 3 N. D. 293, 55 N. W. 753; *State v. Kent*, 5 N. D. 516, 67 N. W. 1052; *People v. Fielding*, 53 N. E. 497; *People v. Mull*, 60 N. E. 629.

The court charged: "The law presumes that every man intends the natural, necessary and probable consequences of his acts." This is error; intent is always a question of fact for the jury. *State v. Stewart*, 29 Mo. 419; *Floyd v. State*, 1 Greene's Crim. Rep. 757; 1 Am. Crim. Rep. 6.

The law does not presume intent from the use of a deadly weapon. *Patterson v. State*, 11 S. E. 620; *Gilbert v. State*, 16 S. E. 652; *Gallery v. State*, 17 S. E. 863.

To constitute an assault there must be an intentional attempt by violence to do injury to the person of another, coupled with the present ability to do such injury. *State v. Godfrey*, 11 Am. State Rep. 830.

The evidence shows that defendant did not shoot or attempt to shoot at Martin, nor strike or attempt to strike him with the revolver; there is no presumption that the pistol was a deadly weapon, and the instructions of the court were error. *Pierce v. State*, 21 Tex. App. 540; *Miles v. State*, 23 Tex. App. 410; *Flournoy v. State*, 25 Tex. App. 244. Defendant's statement to Martin, so far as a display of the pistol was concerned was simply a conditional statement and negatives any intent to kill or to do bodily harm. *Hairston v. State* 3 Am. Crim. Rep. 6; *People v. Oddell*, 46 N. W. 601; *Territory v. Conrad*, 1 N. D. 338, 46 N. W. 605; *State v. Godfry*, *supra*.

It was error for the court to instruct that the questions of time, place and person were not really in dispute in the case. *State v. Barry*, 11 N. D. 428, 92 N. W. 809; *Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1003; *State v. Marcks*, 3 N. D. 532, 58 N. W. 25.

Emerson H. Smith, State's Attorney, and *W. H. Barnett*, Assistant State's Attorney, for the respondent.

A jury may find the defendant guilty of any offense, the commission of which is necessarily included in that which he is charged in the information or indictment, or of an attempt to commit an offense. *People v. Odell*, 46 N. W. 601; *State v. Johnson*, 3 N. D. 150, 54 N. W. 547; *State v. Marcks*, 3 N. D. 532, 58 N. W. 25; *People v. English*, 30 Cal. 215.

The cases in 3 N. D. 150 and 40 Cal. 426 are distinguishable in this, that the jury failed to find in their verdict that the assault was committed with any weapon whatever. *People v. English*, 30 Cal. 215.

Remarks of the state's attorney in his address to the jury complained of by the appellant, were mere deductions and inferences and were proper and right. *State v. Kent*, 5 N. D. 516, 67 N. W. 1052; *State v. McGahey*, 3 N. D. 293, 55 N. W. 753.

The charge of the court, "the question of time, place and persons was not in dispute," was not taking from the jury any question of fact, as the defendant himself admitted the time, place and persons and weapons used. The reason of the rule ceased and therefore the rule itself ceased. Section 5772 Rev. Codes 1899. *Burr v. Armstrong*, 56 Mo. 577; *Cadwell v. Steppins*, 57 Mo. 589, *Fields v. Wabash & St. Louis R. R. Co.*, 80 Mo. 203; *Carter v. Chainis*, 79 Ala. 223; *Kooks v. Frick*, 75 Ga. 715, 14 Am. St. 36.

ENGERUD, J. Defendant was tried on a plea of not guilty to an information of which the charging part was as follows: "That at the said time and place the above-named defendant, Frank J. Cruikshank, did feloniously, then and there having a present ability to commit the crime of murder, assault one Fred Martin with a deadly weapon, to wit, a pistol then and there held in the hands of said defendant, and then and there pointed and aimed at said Fred Martin, and with felonious intent to kill said Fred Martin." The trial court instructed the jury that this information accused the defendant of the crime defined in section 7115, Rev. Codes 1899. The jury were further instructed that the offense defined in section 7145, Rev. Codes 1899, was necessarily included in the offense charged in the information, and hence that the defendant might be found guilty of the lesser crime, under section 7145, if they found that the defendant intended to do bodily harm, but not to kill. The jury returned the following verdict: "We, the jury, find the defendant guilty of the crime of assault with a dangerous weapon, with intent to do bodily harm to the complaining witness, Fred Martin, although without intent to kill him, as he stands charged in the information." Motions for a new trial and in arrest of judgment were overruled, and the defendant sentenced to a term of imprisonment in the penitentiary. He appeals from this judgment.

One of the grounds urged in arrest of judgment was that the information did not state facts sufficient to constitute a public offense. This objection to the information cannot be sustained. It is apparent from the record that the information was drafted and the case tried on the theory that a mere assault with a firearm, as such, comes within the definition of the acts made punishable by section 7115, Rev. Codes 1899. That theory is erroneous. For reasons to be hereinafter stated, an assault with a firearm, as such, although with intent to kill, is not within the description of the crime defined by section 7115, unless the assault is of such a character as to amount to shooting, or attempting to shoot. We are of opinion, however, that the acts charged against the defendant in this information are sufficient to charge an attempt to shoot with intent to kill, so that the information sufficiently states the offense defined by that part of section 7115 which reads as follows: "Every person who shoots or attempts to shoot at another, with any kind of firearm, air gun or other means whatever with intent to kill any person, * * * is punishable," etc. The information does not use the language of the statute, but it is not necessary to do so if the facts stated set forth all the essential elements of the offense defined by the law.

This information, in substance, charges that the defendant feloniously aimed a loaded pistol at another, with the then existing intent to then and there kill the person aimed at. No reasonable deduction from the facts stated is possible, other than that the defendant intended to discharge the pistol with the intent thereby to kill the person aimed at, and that he was in the act of executing his wicked design. This is clearly an "attempt to shoot." The defendant had the present intention to shoot, the present ability to carry his intention into effect, and the aiming was an overt act essential to, and immediately connected with, the act of discharging the pistol.

The appellant challenges the sufficiency of the verdict to sustain the judgment and sentence. We are of opinion that the judgment and sentence are not warranted by the verdict, but our conclusion is based on reasons different from those urged by counsel. In order to explain the reasons for our conclusion, it will be necessary to consider and construe sections 7115, 7145, Rev. Codes 1899, which read as follows:

"Sec. 7115. Every person who shoots or attempts to shoot at another, with any kind of firearm, air gun or other means whatever with intent to kill any person, or who commits any assault and battery upon another by means of any deadly weapon, or by such other means and force as was likely to produce death, with intent to kill any other person, is punishable by imprisonment in the penitentiary not less than one and not exceeding ten years."

"Sec. 7145. Every person who, with intent to do bodily harm and without justifiable or excusable cause, commits any assault or assault and battery upon the person of another, with any sharp or dangerous weapon, or who without such cause, shoots or attempts to shoot at another, with any kind of firearm or air gun or other means whatever, with intent to injure any person, although without intent to kill such person or to commit any felony, is punishable by imprisonment in the penitentiary not less than one and not exceeding five years, or by imprisonment in a county jail not exceeding one year."

It will be seen that the second clause of section 7115 declares that assault and battery with a deadly weapon, with intent to kill, is severely punishable as a felony, but does not make criminal an assault with like weapons and intent. This language clearly excludes from the class of acts referred to by it all mere assaults with a firearm unless the gun or pistol is used as a club, or unless the gun or pistol is discharged, and the person assaulted hit or touched, so that the act amounts to an assault and battery. The preceding clause of the same section, however, deals exclusively with assaults by means of firearms or weapons of that general character. It declares, in effect, that any assault or assault and battery with such weapons with intent to kill the person assaulted, if the assault is of such a character as to constitute shooting or attempting to shoot, shall subject the offender to the same punishment as the acts mentioned in the succeeding clause. It is clear that the acts denounced in the first clause of section 7115, dealing with firearms and similar weapons, constitute in every instance an assault with a deadly weapon with intent to kill, because an assault is defined to be "any wilful and unlawful attempt or offer with force or violence to do a corporal hurt to another." Rev. Codes 1899, section 7141. It is sufficient to constitute an assault that there be an overt act of threatened violence, with the apparent ability to commit a battery. 2 Bishop, Crim. Law, sections 22-32; 1 Wharton, Crim. Law, section

603. It is equally clear, also, that such assault would not in all cases be a battery, which is defined to be "any wilful and unlawful use of force or violence upon the person of another." Rev. Codes 1899, section 7142. To constitute a battery, there must be an actual touching, however slight, of the person assaulted. 2 Bishop, Crim. Law, section 72. It is likewise obvious that, although shooting or attempting to shoot unlawfully at another is in all cases an assault, yet unlawfully assaulting with intent to shoot is not always an attempt to do the act intended. An attempt to shoot requires more than a mere assault. An attempt is a frustrated effort to execute some intended complete act. To constitute an attempt, there must be a present, actual, specific intent to do a complete act, and the actual doing of some overt act which is one of the series of minor acts directly involved in the performance of the ultimate act intended. *Stow v. Converse*, 4 Conn. 17, 37; *Commonwealth v. McDonald*, 5 Cush. 365; *Graham v. People*, 181 Ill. 477, 55 N. E. 179, 47 L. R. A. 731. The statute in question presents a case where the court should apply that elementary rule of construction that "specific provisions relating to a particular subject must govern in respect to that subject as against provisions in other parts of the law which might otherwise be broad enough to include it." *Felt v. Felt*, 19 Wis. 193. It follows that an assault or assault and battery with a firearm or similar weapon, as such, is excluded from the meaning of the language employed in the second clause of section 7115; and it further follows, as hereinbefore stated, that an assault with a firearm or similar weapon, as such, with intent to kill, is not an offense, under section 7115, unless the assault is of such a nature as to constitute shooting or attempting to shoot. In other words, section 7115 is divisible, and should be construed as if each of the two clauses mentioned were separate sections, independent and exclusive of each other. Turning now to section 7145, it will be seen that the same reasoning applies to it as we have applied in analyzing section 7115; that the two clauses describing the offenses defined therein should be read and understood as if they were separate sections, each exclusive of the other. The result is that the offense described in the second clause of section 7145 is merely a lesser degree of, and is necessarily included in, the offense defined in the first clause of section 7115. The same is also true of the first clause of section 7145 and the second clause of section 7115. In *State v. Johnson*, 3 N. D. 150, 54 N. W. 547, this court used

language from which it might be inferred that in all cases the offenses described in section 7145 were necessarily included in those defined in section 7115. Under the facts of that case, the law was correctly applied, but the language was general, and should have been modified to the extent above indicated. Tested by the rule applied in *State v. Johnson*, *supra*, and in *State v. Marcks*, 3 N. D. 532, 58 N. W. 25, it will be seen that the verdict in this case cannot support a judgment for the felony defined in section 7145. As already shown, neither section 7115 nor section 7145 makes a mere assault with a firearm, as such, a felony, even though the intent mentioned in the respective sections is established. The verdict is conclusive that the jury found only an assault, but failed to find an attempt to shoot. The verdict is therefore nothing more, in effect, than a finding of simple assault. Inasmuch, however, as an assault is an offense necessarily included in the crime charged in the information, the verdict is valid to that extent. The evidence is sufficient to justify a conviction for assault. It is substantially undisputed that the defendant pointed a loaded revolver at the complaining witness for the purpose of frightening the latter into compliance with the defendant's demand for the settlement of a claim for wages. *Keefe v. State*, 19 Ark. 190; *State v. Morgan*, 25 N. C. 186, 38 Am. Dec. 714; *State v. Taylor*, 20 Kan. 643.

The remaining assignments of error do not require notice, as they relate to instructions given and requests for instructions refused touching matters involved only in the consideration by the jury of the felonies defined in sections 7115 and 7145, of which felonies we hold that the defendant has been acquitted.

The judgment appealed from is reversed, and the cause remanded, with directions to the district court to render judgment on the verdict as for an assault, under section 7144, Rev. Codes 1899. All concur.

(100 N. W. 697.)

NOTE—On the charge of assault and battery committed with a deadly weapon with intent to kill, accused may be convicted of an assault and battery with intent to do bodily harm. *State v. Johnson*, 3 N. D. 150, 54 N. W. 547. Charge of an aggravated assault with a dangerous weapon committed with intent to do bodily harm includes simple assault, but not necessarily assault and battery. *State v. Marcks*, 3 N. D. 532, 58 N. W. 25. On a charge of assault and battery with a dangerous weapon, without justifiable or excusable cause, and with intent to do bodily harm, accused may be convicted of simple assault and battery. *State v. Climie*, 12 N. D. 33, 94

N. W. 574. An indictment of burglary in the third degree by breaking and entering a railroad car with intent to steal, will sustain a conviction for entering a railroad car with intent to steal. *State v. Tough*, 12 N. D. 425, 97 N. W. 546.

O. A. BRASETH V. COUNTY OF BOTTINEAU, A MUNICIPAL CORPORATION.

Opinion filed August 27, 1904.

Opening Default Judgment — Mistake — Prompt Motion for Relief.

1. The trial court did not abuse its discretion in vacating a default judgment, where the default was in the service of answer, and for but one day, and arose from a mistake as to the date of service of the summons and complaint, and the defendant moved promptly for relief.

Affidavit of Merits — Verified Answer.

2. Under the practice established in this state it is necessary that a motion to vacate a default judgment shall be accompanied by an affidavit of merits, and good practice also requires a verified answer. But the latter is not indispensable when the defense is stated in the affidavit of merits.

Affidavit of Merits by State's Attorney.

3. Where an affidavit of merits, made by the state's attorney on behalf of his county, and as its attorney in the action, states that the defendant has a good and sufficient defense, as shown by its answer, which is attached to and made a part thereof, it is sufficient as an affidavit of merits, and will sustain the order vacating the judgment.

Appeal from District Court, Bottineau county; *Cowan, J.*

Action by O. A. Braseth against the County of Bottineau. Judgment for defendant, and plaintiff appeals.

Affirmed.

B. G. Skulason, for appellant.

Affidavit should be made by the chairman of defendant's county commissioners, not the attorney. The only reason for the failure to answer was the negligence of such chairman in not correctly informing the state's attorney of the correct time of service of summons. The excuse is entirely insufficient. *Elliott v. Shaw*, 16 Cal. 377; 6 Enc. Pl. & Pr. 162; *Union Hide, etc., Co. v. Woodley*, 75 Ill. 435; *Shay v. Chicago Clock Co.*, 44 Pac. 237; *Welch et al. v. Challen*, 3 Pac. 314.

Every consideration of expediency and justice is opposed to opening a default judgment, unless it appears that the judgment as it stands is unjust. *Parrott v. Den*, 34 Cal. 79.

The requirements of reopening a default judgment are, 1st, a sufficient affidavit of merits; 2d, service of proposed verified answer with moving papers; 3d, trial court may accept an affidavit setting out a valid defense, in lieu of a verified answer. *Wheeler v. Castor*, 11 N. D. 347, 92 N. W. 381.

When affidavit is made by an agent or attorney, he should swear to his belief of a defense on the merits, to his knowledge of the defense, and from whom he derived it. 1 Enc. Pl. & Pr. 371 and note; 1 Black on Judgments, section 347; Freeman on Judgments, section 108.

And, further, as to affidavit on motions to reopen, see *Gauthier v. Rusicka*, 3 N. D. 1, 53 N. W. 80; *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151; *Kirschner v. Kirschner*, 7 N. D. 291, 75 N. W. 252.

A. G. Burr, for respondent.

The state's attorney of defendant county was misinformed as to the date of service, and no official notice was on file in the clerk's office. Where a contrary state of facts exists, public corporations would not be entitled to relief; where there is an honest mistake as to such a fact and action is prompt and correct while acting under mistake, relief should be granted. 17 Am. & Eng. Enc. Law (2d Ed.) 834.

Where there is a mistake in good faith as to time of service of a summons, leading to a default, relief will be granted. *Miller v. Carr*, 48 Pac. 324; 58 Am. St. Rep. 180; *Titus v. Larsen*, 51 Pac. 351; *Jensen v. Barbour*, 31 Pac. 592, 594.

Defendant's answer was not verified nor was the complaint. But when answer was served defendant's counsel did not know of default. He was not required to verify answer, under section 5280, Rev. Codes 1899. Defendant's motion embodied an application to recognize defendant as appearing in time, defendant not then having knowledge of default. The unverified answer was attached to and included in affidavit in the moving papers, and affidavit states that affiant, meaning defendant, "has good and sufficient defense to said action." Such affidavit is sufficient without stating the facts. 1 Enc. Pl. & Pr. 362.

The state's attorney was as well qualified as any other officer to make the affidavit, and to know the facts of the case. *City of Fargo v. Keeney*, 11 N. D. 484, 92 N. W. 836.

Instruments attached and made part of affidavits, are construed as a part thereof. *City of Fargo v. Keeney*, *supra*. Where affidavit of merits sets out a valid defense, it may be accepted in lieu of an answer. *Wheeler v. Castor*, 11 N. D. 347, 92 N. W. 381.

When affidavit states that defendant has "fully and fairly stated all the facts in the case to his counsel, and that upon such statement his counsel has advised him that he has a good defense on the merits," it is itself sufficient. *Kirshner v. Kirshner*, 7 N. D. 291, 75 N. W. 252. If the answer showed but a partial defense the judgment should be reopened. 6 Enc. Pl. & Pr. 185; *Douglass v. Todd*, 31 Pac. 623; *Titus v. Larsen*, 51 Pac. 251.

It is sufficient to show a case that is *prima facie* meritorious. 6 Enc. Pl. & Pr. 188; *Douglass v. Todd*, 31 Pac. 623. Application to vacate a judgment is addressed to the discretion of the court, and will not be interfered with if any discretion is used; when the discretion is exercised in vacating a judgment, a stronger showing of abuse must be made than when motion to vacate is denied. *Bigler v. Baker*, 58 N. W. 1026, 24 L. R. A. 255. The discretion of a trial court is not governed by any inflexible rule. *Pengilly v. J. I. Case Thresh. Mach. Co.*, 11 N. D. 249, 91 N. W. 63; *Wheeler v. Castor*, *supra*; *Kitzman v. Minn. Thresh. Machine Co.*, 10 N. D. 26, 84 N. W. 585. Where there is doubt whether court used discretion in granting or withholding an order to vacate a judgment, the doubt is resolved in favor of the applicant. 6 Enc. Pl. & Pr. 202; *Persons v. Drobaz Fishing Co.*, 34 Pac. 76; *Wolf & Co. v. Canadian P. Ry. Co.*, 29 Pac. 825. It is no injury to plaintiff that he is required to try the action. *Bray v. Church of St. Brandon*, 40 N. W. 518.

YOUNG, C. J. The plaintiff appeals from an order of the district court of Bottineau county vacating a judgment which he had caused to be entered in this action against the defendant upon default of answer.

Counsel for appellant contends, as grounds for reversal, that (1) the defendant has not offered a sufficient excuse for his failure to answer within the statutory period, and (2) that the motion papers are not legally sufficient. We are of opinion that neither of these objections should be sustained. The action is to recover a balance of \$4,095, which the plaintiff alleges is due for labor and

material furnished to the defendant in building a court house and jail. Plaintiff's counsel resides and has his office in the city of Grand Forks. The sheriff's return states that he served the summons and complaint on the chairman of the board of county commissioners of Bottineau county, the defendant herein, on December 15, 1902. On January 31, 1903, the judge of the third judicial district signed an order for judgment upon the application of plaintiff's counsel and his affidavit bearing date January 15, 1903; that more than thirty days had elapsed since the service of the summons and complaint, and that no answer or demurrer had been received by him, or appearance in any manner made by the defendant, and in pursuance of such order judgment was entered by the clerk of the district court of Bottineau county on February 4, 1903. The defendant's motion bears date January 29, 1903, and was returnable before the presiding judge at his chambers in Devils Lake, in Ramsey county, on February 17, 1903. It is based upon the affidavit of Irving R. Barkway, clerk of the district court of Bottineau county, the affidavit of A. G. Burr, state's attorney for that county and its attorney in this action, the defendant's answer attached thereto, and the records and files in the case. The affidavit of A. G. Burr, which was made on the 29th day of January, 1903, states that when the chairman of the board of county commissioners delivered the copy of the summons and complaint to him he informed the affiant that they were served on December 16, 1902; that he prepared an answer to the complaint and mailed the original and a copy of the same to plaintiff's counsel at Grand Forks on January 15, 1903; that they were received by plaintiff's counsel on or before the 16th, but were returned to the affiant by said attorney with a statement that the said answer was not served within the time required by law; that neither the summons, complaint, nor any other paper are on file or have been filed in the clerk's office; that he has not seen the sheriff's return, which he believes is in the plaintiff's possession; that there is no record in the court, nor anything accessible to the affiant, by which he can tell on what day the summons and complaint were served, except the statement of the chairman of the board "that this affiant [defendant] has a good and sufficient defense to said action, as shown by the copy of the answer herein, attached to this affidavit," and "prays that this defendant be recognized as having appeared in this action within the time required by law, or that judgment be reopened or vacated, if the same has been entered, and the defendant be

permitted to defend on such terms as the court shall deem just." The affidavit of Barkway, which is dated January 30, 1903, states that "no papers or records of any kind have ever been filed in his office in the above-entitled case." The answer, attached to the affidavit, is unverified. It is conceded that it states a defense to at least a part of the plaintiff's cause of action. In his motion proper the defendant's attorney asked (1) that, in case the answer was in fact served in time, no further proceedings be had in the case without due notice to the defendant; and (2) that, in case judgment had been entered, it be vacated and the defendant permitted to answer on such terms as the court should deem just.

In our opinion, the trial court did not abuse its discretion in holding that the defendant had sufficiently excused its default or error, and in holding that the motion papers were legally sufficient. Section 5298, Rev. Codes 1899, provides that "the court may, * * * in its discretion, and upon such terms as may be just, allow an answer * * * to be made or other act to be done after the time limited by this Code, or, by an order, enlarge such time; and may also within one year after notice thereof, relieve a party from a judgment * * * taken against him through his mistake, inadvertance, surprise or excusable neglect." It is clear to us that the affidavit attached to the motion papers—and it will be noted that the notice of motion was served before the judgment was entered—furnished ample grounds for an extension of time in which to answer, and also to vacate the judgment which was thereafter entered. The default was occasioned solely by the mistake of the chairman of the board of county commissioners as to the day of service in stating that it was the 16th, instead of the 15th, which the sheriff's return shows was the true date. An error of one day in stating a date is not such an unusual occurrence that it can be said to be inexcusable. To so hold would require unusual, if not almost impossible accuracy. It is evident the mistake was an honest one, and the defendant proceeded promptly to correct it. Negligence cannot be imputed to the state's attorney for not answering sooner, for he made timely service of the answer according to the information he had received. He also moved promptly for relief, even without positive knowledge that he was in fact in default, and before judgment was entered. The citation of authority should not be necessary, but the following cases rest upon a similar state of facts and may be cited in support of our conclusion that the mistake

was excusable: *Miller v. Carr*, 116 Cal. 378, 48 Pac. 324, 58 Am. St. Rep. 180; *Titus v. Larsen*, 18 Wash. 145, 51 Pac. 351; *Jensen v. Barbour* (Mont.) 31 Pac. 592; *Hanthorn v. Oliver*, 32 Or. 57, 51 Pac. 440, 67 Am. St. Rep. 518; *Gardiner v. Crocker*, 3 Caines, 139. See, also, *Ordway v. Suchard*, 31 Iowa, 481; *Johnson v. Eldred*, 13 Wis. 482. The reasons alleged in support of the contention that the motion papers are not legally sufficient are: "First, the proposed answer is not verified; second, no affidavit of merits is submitted; third, the affidavit does not set up a valid defense or any defense to plaintiff's cause of action." This court, in *Wheeler v. Castor*, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746, after reviewing all of its former adjudications relating to the opening of defaults, laid down the following rules: "First, a sufficient affidavit of merits is indispensable in all cases; second, it is proper practice to serve and submit a proposed verified answer with the moving papers, setting up a defense which is valid on its face; third, where a verified answer is not submitted, the trial court may, at its discretion, accept in lieu of such answer an affidavit setting out a valid defense to plaintiff's cause of action. Such an affidavit, in our opinion, would serve the purpose of an answer, and constitute a substantial compliance with the strict rule which requires the submission of a proposed verified answer embracing a defense." Tested by the rule thus formulated, the moving papers were sufficient. In this case there was an answer, but it was not verified. That was not fatal, however. Had no answer at all been attached, as in *Wheeler v. Castor*, it would still have been within the discretion of the court to make the order, provided the affidavit, if otherwise sufficient, stated a valid defense. The failure to verify the answer is explained by the fact that the complaint was not verified. The defendant can be in no worse position because he served an answer which was not verified than he would have been had he served no answer.

The objection that there is no affidavit of merits, and that the affidavit does not set up a valid defense, goes to the form and sufficiency of the affidavit, and not to the fact that no attempt is made to show merits, or to state a defense. We think this objection also is not well grounded. The affidavit is positive as to the merits of the defense, and the affiant exhibits, as a part of his affidavit, the proposed answer, which, it is conceded, states a defense to at least a part of the plaintiff's cause of action. The language of the affi-

davit is, "that this defendant has a good and sufficient defense to said action, as shown by the copy of the answer herein attached to this affidavit." The objection to the form of the affidavit is without merit. True, the facts which constitute the defense are not set out in the body of the affidavit, but the answer is attached to and made a part of it, and it is conceded that it states at least a partial defense. Neither is there substantial merit in the objection that the affidavit was made by the attorney in the action, and is not in the form generally approved. The defendant is a municipal corporation and can act only through its officers. The attorney who made the affidavit is the state's attorney of the defendant county, and was a proper person to act on its behalf. It is apparent that the general rules by which the sufficiency of affidavits of merits, whether made by parties or their attorneys, are to be tested, do not apply to an affidavit like this, which is made by the law officer of the county, and on its behalf, and also as its attorney in the action.

We have treated the default judgment as regularly entered, and tested the order by the rules of practice relating to vacating such defaults. It is a serious question, however, whether the entry of judgment while the defendant's motion for relief from his default in answering was pending and undetermined was not so irregular as to entitle the defendant to have it set aside on that ground alone, and without showing merits. That view is fairly supported by the following cases: *Manwaring v. Lippincott* (Sup.) 65 N. Y. Supp. 428; *Atchison Ry. Co. v. Nichols*, 8 Colo. 188, 6 Pac. 512; *Farris v. Walter*, 2 Colo. App. 450, 31 Pac. 231; *Ridgway v. Horner*, 55 N. J. Law, 84, 25 Atl. 386; *Thomas v. Douglass*, 2 Johns. Cas. 226; *Depeyster v. Warne*, 2 Caines, 45; *Browning v. Roane*, 9 Ark. 354, 50 Am. Dec. 218; *Mattoon v. Hinkley*, 33 Ill. 209; *Hosmer v. Hoitt*, 161 Mass. 173, 36 N. E. 835. See, also, *Freeman on Judgments*, section 97; *Black on Judgments*, section 326. Also *Garr, Scott & Co. v. Spaulding*, 2 N. D. 414, 51 N. W. 867; *Prondzinski v. Garbutt*, 9 N. D. 239, 83 N. W. 23.

Finding no error or abuse of discretion, the order appealed from will be affirmed. All concur.

(100 N. W. 1082.)

E. M. PATTON v. THE COUNTY OF CASS AND ARTHUR G. LEWIS,
AS AUDITOR OF CASS COUNTY.

Opinion filed September 3, 1904.

Taxation — Lands Sold to State Not Taxable After Three Years from Sale.

1. Lands bid in for the state at a tax sale under chapter 132, p. 376, Laws 1890, and not redeemed or assigned within three years from such sale, become forfeited lands, and are not thereafter subject to sale for taxes while they remain forfeited lands.

Tax Deed from County Auditor — Validity.

2. Lands bid in for the state under the revenue law of 1890 (Laws 1890, p. 376, c. 132), and becoming forfeited lands in 1893, cannot be lawfully sold for taxes attempted to be levied thereon for 1896 after becoming delinquent in 1897. If offered for sale in 1897 on such tax, and bid in for the state, and the county auditor, without direction from the state auditor, assigns the certificate to one who pays the amount for which sold, and subsequent taxes, and thereafter procures a deed from the auditor, such deed is not authorized and conveys no title.

Authority of County Auditor.

3. A county auditor has no authority except such as is expressly or impliedly conferred upon him by statute.

Appeal from District Court, Cass county; *Pollock, J.*

Action by E. M. Patton against Cass county and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Morrill & Engerud, for appellant.

Emerson H. Smith, for respondents.

MORGAN, J. This is an action to quiet title to a tract of land in the city of Fargo, and involves conflicting interests to said tract, derived under tax proceedings under which plaintiff and defendant each claim the absolute title and ownership of the tract. The facts, as gathered from the findings of the trial court, which are not in dispute, are as follows: On the 16th day of December, 1897, the land in question was offered for sale by the auditor of Cass county for the delinquent taxes thereon for the year 1896, and, there being no other bidders therefor, the tract was struck off and sold to the county of Cass. On the 22d day of October, 1900, one Bolley made application to the auditor of Cass county for an assignment of the

county's interest in said land, and the auditor assigned all the county's interest therein to said Bolley upon payment to the county of the sum of \$44.06; being the amount due the county under the sale, with interest and penalties, together with taxes levied thereon as taxes subsequent to the sale for the years 1897 and 1898. On the 29th day of May, 1901, the auditor of said county delivered to said Bolley a deed of said land in the form prescribed by law; the time for a redemption from the sale of 1897 having expired, and notice that the time for such redemption had expired having been given. The plaintiff derives his title to said land by virtue of a conveyance thereof to him from said Bolley on the 5th day of February, 1903. The foregoing facts show the steps under which the plaintiff claims the title and ownership of said land. The county disputes the plaintiff's ownership of said land and bases its contention on the following proceedings: In 1890 the taxes on said tract were unpaid and delinquent, and it was duly offered for sale for such delinquent taxes of the year 1889, and was bid in and struck off to the state by the county auditor, there being no other bidders for the tract at such sale. No sales of this tract were made between the years 1891 and 1896, inclusive, and the taxes thereon were marked on the county records as taxes subsequent to sale of 1890, during the years 1890 to 1897, inclusive, except the years 1895 and 1896. Upon the facts stated, the district court dismissed plaintiff's action upon the ground that the county auditor had no authority to place the land on the assessment roll in 1896, and that all proceedings relating to the assessment, sale, assignment and conveyance of the same were void.

The sole question at issue is the status of said tract of land, under the revenue law of 1890 (Laws 1890, p. 376, c. 132), after it had been bid in for the state, and the authority of the county auditor over it under that law. This question has not hitherto been decided by this court, unless the case of *Emmons County v. Bennett*, 9 N. D. 131, 81 N. W. 22, is in point. Plaintiff contends that the facts and the statutes under which that case was decided are the same as in the case at bar. Defendant contends that the Compiled Laws of 1887 and the Laws of 1890 are not the same in reference to lands bid in for the state. A reference to the Compiled Laws, as quoted and construed in *Emmons County v. Bennett*, *supra*, shows that, when lands were bid in by the county treasurer for the county in the absence of other bidders, the county secured no rights except

such as were secured by any other purchaser. The interests of the county under the certificate of sale were no greater or different than in case of sales to others, and sales made to another subsequent to the sale to the county, followed by a deed under such subsequent sale, defeated the rights of the county derived through its certificate of sale. In other words, the Compiled Laws did not extinguish between the rights of the county and the rights of others bidding in lands at tax sales. In the case cited the principle "that the interest which a purchaser of lands at a tax sale acquires is, in the absence of a statute to the contrary, freed from liability for delinquent taxes of previous years, and that a tax deed regularly issued cuts off all interests acquired by purchasers at tax sales for taxes prior to that upon which the tax deed is based," was laid down as applicable against counties as well as against all purchasers. There is nothing in the Compiled Laws of 1887 to indicate that counties were placed on a different basis than purchasers generally under that law. A comparison of the law of 1890, under which the county bid in this land in 1890, with the Compiled Laws, shows that the two enactments are radically different. Section 70, c. 132, p. 403, Laws 1890, authorizes the county auditor to bid in land for the state at tax sales if there are no other bidders. Section 77 authorizes an assignment of the state's interest acquired by virtue of bidding in lands at tax sales to any person, upon payment of the amount for which said land was bid in for, and the amount of all subsequent delinquent taxes, penalties, costs and interest, if such assignment is applied for before the land becomes forfeited to the state, and while unredeemed from the sale. Section 86 provides that persons having an interest in the land, or the owner thereof, may redeem at any time after forfeiture and before sale thereof, by paying the amounts due against the land, and that all real property bid in by the state "and not redeemed or assigned within three years from the date of sale shall become the absolute property of the state and may be disposed of by the county auditor at public or private sale, as the state auditor may direct, subject to such rules and restrictions as he may prescribe. All tracts or lots becoming so forfeited to the state, shall be stricken from the tax lists and shall not be assessed or taxed until sold to an actual purchaser." There was not any sale of this tract to an actual purchaser, within the meaning of said section 86, *supra*, before the sale of 1897. It was not, therefore, properly on the sale list of 1897. The state auditor had made no direction that this tract

should be sold for the 1896 tax, nor had he given any directions that the county auditor should assign the certificate of sale to any person upon payment of the amount due for taxes on said lot for the years 1896 to 1898, inclusive, with costs of sale, penalty and interest. Under said section the authority of the county auditor over the tract in question was taken away from him entirely. He had no authority to put it on the sale list, nor sell it, without directions from the state auditor. After forfeiture to the state—that is, after the redemption period has expired—the statute directs that forfeited lands and other lands sold for taxes shall be disposed of differently, so far as taxation proceedings are concerned. In case of forfeited lands, there is to be no sale thereof; and, in case of other lands sold for taxes, a sale follows each year if the taxes are not paid.

The rights of the parties must be measured by the law of 1890. The sale in 1897 was therefore without legal sanction or statutory authority. The assignment to Bolley of the certificate of sale by the county auditor was not authorized by law, as the auditor alone had no power to dispose of forfeited lands under any circumstances. Chapter 126, p. 256, Laws 1897, did not affect sales already made under previous laws, and pertained to revenue and taxation prospectively only. The law under which *Emmons County v. Bennett*, supra, was decided, did not have the provision in it that is found in section 86, chapter 132, p. 408, of the 1890 revenue law, which says that lands bid in for the state shall not be taxed after forfeiture. The provisions of section 86, supra, are sufficient alone for holding that the two laws are not substantially alike in respect to lands bid in for the state or county. Under section 86, lands bid in for the state are made a class by themselves after forfeiture, and are expressly made nontaxable, and no sale is provided for under the 1890 law for taxes levied on lands bid in for the state. A comparison of the revenue law of 1887 with the 1890 revenue law clearly shows that the procedure in taxation matters relating to forfeited lands is entirely and substantially different. These provisions are so different that the *Emmons County* case is not applicable under the 1890 law or under the 1897 law. Under both of these revenue laws the auditor has no authority to sell forfeited lands, or lands bid in for the state, of his own motion. His authority under these laws as to sales of such lands was subject to the directions of the state auditor under the 1890 law, and of the county commissioners under the 1897 law.

It is also claimed that *State v. Camp* (Minn.) 82 N. W. 645, is decisive of this case, and against the county. That case was also decided under statutory provisions unlike our own. In other words, the provisions of section 86, chapter 132, p. 408, Laws 1890, that lands bid in for the state shall be stricken from the tax lists and shall not be assessed or taxed after forfeiture, are not found in the revenue law of Minnesota, under which *State v. Camp* was decided.

These cases not being in point, and none others being cited, we see no way by which to sustain the plaintiff's tax deed. It was not based upon any law authorizing the sale under which the deed was issued. The assignment and deed were both beyond the authority of the auditor to execute. The plaintiff's grantor acquired no valid title under such proceedings, and had none to convey to plaintiff. The provisions of the 1890 law determine his rights, and show the absolute invalidity of his deed. His contract, therefore, fails, because there was no law authorizing the auditor to dispose of the state's interest in the tract in question, and he is held to have known that the auditor was acting without authority.

It is claimed that the plaintiff's deed is valid because executed by the auditor, who acted within the scope of his authority, but acted erroneously, and that his acts are binding upon the county. We fail to see that the auditor was acting within the scope of his authority. He possessed no authority to act in reference to forfeited lands at all on his own motion. His duties are defined by statute. Without statutory authority, express or implied, he cannot act and bind the county. The auditor is not the agent of the county, having, as such, any authority not delegated to him by the statute. As said in *Day Company v. State*, 68 Tex. 526, 4 S.W. 865. "The powers of all officers are defined and conferred by law, and of these all persons who deal with them must take notice. Acts done in excess of the powers conferred are not official acts." See, also, *State v. Brewer*, 64 Ala. 287; *Pulaski v. State*, 42 Ark. 118.

The plaintiff having no valid deed, nor any right to one, it follows that the judgment must be affirmed.

YOUNG, C. J., concurs. ENGERUD, J., having been of counsel, took no part in the above decision.

(102 N. W. 174.)

STATE OF NORTH DAKOTA V. L. S. HARTZELL AND E. T. BASCOM.

Opinion filed September 7, 1904.

Appellate Court Will Not Discuss Law or Facts on Application for Bail.

1. In order that it may not prejudice the rights of a defendant in a criminal case upon his final trial, this court will not ordinarily, in refusing an application for bail, discuss either the facts or the law of the case.

Applicants Not Entitled to Bail.

2. Upon the record presented in this application it is *held*, that (1) the petitioners are not entitled to bail as a matter of strict legal right, and (2) that no cause is shown for granting it as matter of discretion.

Petition of L. S. Hartzell and E. T. Bascom for release on bail.
Denied.

E. R. Sinkler and Bosard & Bosard, for petitioners: *George M. Price*, State's Attorney.

YOUNG, C. J. Habeas corpus for bail. The petitioners, L. S. Hartzell and E. T. Bascom, were committed by a justice of the peace of Cavalier county, after a preliminary examination and without bail, to answer to the district court of that county upon a charge of murder in the first degree, alleged to have been committed on July 7, 1904, upon the body of Byron U. Stoddard. An application for bail was made to the judge of the district court, and the same was denied. On the application to this court, the state's attorney and counsel for the petitioners have filed a stipulation that the writ need not issue in the first instance, and that the merits may be disposed of upon the transcript of the testimony taken at the preliminary examination and certain affidavits submitted with the application for the writ.

The petitioners base their right to bail upon section 6, article 1, of the state Constitution, which reads as follows: "All persons shall be bailable by sufficient sureties unless for capital offenses where the proof is evident and the presumption great; * * *" and section 8446, Rev. Codes 1899, which repeats the constitutional guaranty just quoted, and provides that "in such actions it shall be taken only by the Supreme Court or a judge thereof, or by a district court or a judge thereof, and the taking thereof shall be discretionary, regard being had to the nature and circumstances of the offense and to the evidence and to the usages of law. * * *"

This court has held that under the foregoing provisions one charged with a capital offense is entitled to bail as an absolute right "unless the proof of guilt is evident or presumption thereof great," and in case the proof of guilt is evident or the presumption thereof is great the granting or refusal of bail is a matter of judicial discretion. See *State v. Collins*, 10 N. D. 464, 88 N. W. 88.

We have examined the evidence upon which the application for bail is submitted, and are agreed that the petitioners are not entitled to bail as a strict legal right. The allowance of bail is then a matter of judicial discretion, and the record upon which the application is made, like that in *State v. Collins*, *supra*, contains no showing of facts whatever to move our discretion, and this was also true of the application to the district court. In *State v. Collins*, *supra*, we applied the wholesome rule generally approved by appellate courts, and we shall adhere to it in this case, that in denying an application for bail "neither the facts nor the law in such cases will ordinarily be discussed by the court, lest it prejudice the rights of the defendant on his final trial." *Church on Habeas Corpus*, section 389; *Sharp v. State*, 1 Tex. App. 299; *Ex parte Rothschild*, 2 Tex. App. 567; *Ex parte Moore*, 5 Tex. App. 103; *Ex parte Day*, 3 Tex. App. 328.

Application denied. All concur.

(100 N. W. 745.)

PETER REGAN v. RASMUS SORENSON, DANIEL REGAN AND CHARLES TUFFORD, AS THE DISTRICT SCHOOL BOARD OF WEBSTER SCHOOL TOWNSHIP OF RAMSEY COUNTY, NORTH DAKOTA, A CORPORATION.

Opinion filed September 8, 1904.

Injunction — Uncertain Order.

1. An injunctive order which is uncertain with respect to the acts enjoined thereby is void.

Appeal from District Court, Ramsey county; Cowan, J.

Action by Peter Regan against Rasmus Sorenson and others. Judgment for plaintiff, and defendants appeal.

Reversed.

Wm. Anderson and Brennan & Gray, for appellants.

McClory, Barnett & Adamson, for respondent.

✓ ENGERUD, J. This is an appeal by defendants from an order of the district court continuing in force pendente lite a preliminary injunctional order previously made on an ex parte application by plaintiff. The order appealed from (omitting recitals) reads as follows: "It is hereby ordered that the temporary restraining order heretofore issued in the above-entitled action be, and the same is hereby, continued in full force and effect until the final determination of this action." The previous order referred to restrains the defendants "from doing any of the acts which the plaintiff alleges in his said complaint herein that you are threatening and about to do." The order appealed from furnishes no direct information as to the acts prohibited thereby. It merely suggests inquiry. In order to ascertain its scope and effect, it is necessary to pursue the inquiry step by step through the record of the case until the desired information is discovered. In this case we must resort to the complaint to ascertain what specific things the defendants are restrained from doing. After examining the complaint, we are unable to determine with certainty what is the exact scope and effect of the order. Six consecutive paragraphs of the complaint, beginning with the fourth, are mere assertions as to the interpretation and legal effect of various provisions of the statute, by reason of which it is asserted that the election involved in the case was void. Neither the allegations nor proof furnishes any clear information as to the language of the petition for the election, the form of the resolution ordering the same, or of the notice of the election. In short, no facts are alleged or proven sufficient to put the validity of the election in question. The only facts which we can glean from the complaint are as follows: The plaintiff is a resident taxpayer of Webster school district, and has several children entitled to the school privileges of the district. The defendants are the school directors of the district. An election was held pursuant to a petition under section 704, Rev. Codes 1899, as amended by section 4, chapter 83, p. 100, Laws 1903, on a proposition to consolidate the schools of the district so as to reduce the number of schools from four to two. The proposition to consolidate was carried by a large majority. The complaint alleges that the defendants are about to consolidate the schools, without providing transportation to and from the consolidated schools for the pupils formerly attending the vacated schools; and further alleges that the defendants are about to move school buildings, purchase sites, etc., for the consolidated

schools, which will involve an expense of at least \$1,000, without advertising for competitive bids therefor. The relief prayed for is that the defendants be restrained from proceeding with the consolidation without providing transportation facilities, and from incurring any expense for sites, buildings, etc., without advertising for competitive bids; and it is further prayed that the election be declared void.

It is apparent from paragraphs 4 to 9 of the complaint and the last part of the prayer for relief, as well as from the memorandum filed by the court below and the briefs of counsel, that the plaintiff claimed, and the district court intended to hold, that the election was void, and hence that the defendants should be restrained from effecting the consolidation. The trial court's memorandum of its reason for the decision, however, is no part of the order, and cannot be looked to for an interpretation of the language thereof. The fact remains that the order does not clearly specify, either directly or by reference to the record, what acts are forbidden. When an injunctive order is so indefinite and uncertain that the court with the entire record before it, has difficulty in understanding its meaning, it would be manifestly unreasonable to expect laymen to interpret it correctly, and be governed by its provisions at the peril of severe punishment for disobedience. We hold that the order appealed from should be set aside because it is unintelligible, and therefore decline to explore the record in search of allegations and proofs which might be found sufficient to present some of the questions of law argued by counsel. For the purposes of this case we have assumed that the injunctive order may be made intelligible by reference to the complaint. We do not, however, concede the truth of that assumption.

The order appealed from is reversed. All concur.

(100 N. W. 1095.)

JAMES H. BARNUM v. THE GORHAM LAND COMPANY.

Opinion filed September 10, 1904.

Action Not Triable De Novo Under Chapter 201, Laws of 1903.

1. An action at law for the recovery of money, only tried since the taking effect of chapter 201, p. 277, Laws 1903, is not triable in the district court under the provisions of section 5630, Rev. Codes 1899, as amended, and hence cannot be tried de novo on appeal.

Statement of the Case — Specification of Error.

2. In cases not triable de novo on appeal neither errors of law occurring at the trial nor the sufficiency of the evidence to sustain the findings can be considered by the supreme court without specifications of error embodied in a statement of the case.

Appeal from District Court, Traill county; Fisk, Special J.

Action by James H. Barnum against The Gorham Land Company. Judgment for plaintiff and defendant appeals.

Affirmed.

Francis B. Hart, for appellant.

P. G. Swenson, for respondent.

engerud, J. Defendant has appealed from a judgment of the district court of Traill county. The complaint sets forth a cause of action on a promissory note made and delivered by the defendant to plaintiff, and demands judgment for the amount due on the note. The answer pleads that the alleged note was executed without consideration, and that the transaction in connection with which the note was executed in the name of the corporation by its president was ultra vires of the corporation, and demands judgment that the action be dismissed on the merits. The issues were submitted to the court for trial without a jury, a jury being duly waived. The trial was held on July 24, 1903. After hearing the evidence, the trial court made its findings of fact and conclusions of law in favor of plaintiff. Judgment was ordered and entered accordingly for the plaintiff for the recovery of the sum demanded in the complaint and the taxable costs and disbursements. A statement of the case was settled, containing all the evidence offered and all proceedings had on the trial, and the defendant demands a trial de novo by this court of the entire case, under section 5630, Rev. Codes 1899, which demand was duly embodied in the statement. The statement contains no specifications of error. It is conceded that the findings of fact support the conclusions of law and judgment, and are within the issues made by the pleadings. The only points urged by the appellant for reversal of the judgment are aimed at the alleged insufficiency of the evidence to warrant the decision of the trial court.

Under this state of the record this court is without power to review the evidence. The action was tried after chapter 201, p. 277, of the Laws of 1903, was in force. That law modified section 5630, Rev. Codes 1899, by adding the following proviso thereto:

"That the provisions of this section [5630] shall not apply to actions or proceedings properly triable with a jury." The act took effect July 1, 1903. This action was tried July 24, 1903. The action being one at law for the recovery of money only on express contract, is "properly triable with a jury," and clearly comes within the proviso of the amendatory act referred to. Although this action was commenced before the act took effect, yet the trial was held after the law became operative, and pending actions are not excepted from its operation. It is well settled that under such circumstances the new enactment governs the procedure. Sutherland on Stat. Const. section 482. It follows, therefore, that, although this action was tried by the court without a jury, yet it is within the class of actions which the amendment of 1903 excepts from the provisions of section 5630, Rev. Codes 1899. In the class of actions to which the case at bar belongs the only way in which the evidence or rulings of the court at the trial can be presented to this court for review on appeal is by means of a statement of the case containing the specifications prescribed in section 5467, Rev. Codes 1899. Without such specifications the statement must be disregarded. *Hostetter v. Elevator Co.*, 4 N. D. 357, 61 N. W. 49; *Bank v. Bank*, 5 N. D. 161, 64 N. W. 941; *Schmitz v. Heger*, 5 N. D. 165, 64 N. W. 943; *Nichols & Shepard Co. v. Stangler*, 7 N. D. 102, 72 N. W. 1089; *Baumer v. French*, 8 N. D. 319, 79 N. W. 340.

As there are no errors apparent on the record without the statement, the judgment must be affirmed. All concur.
(100 N. W. 1079.)

OLE HANSON v. OTTO CARLBLOM.

Opinion filed September 10, 1904.

Mistrial — Right of Jury Trial — Reversal on Appeal.

1. A statement of case which shows that a law action triable to a jury as a matter of strict legal right was tried to the court without a jury, under section 5630, Rev. Codes 1890, over defendant's objection, and a jury was not waived, presents a mistrial, which requires a reversal of the judgment and a new trial.

Appeal from District Court, Sargent county; Lauder, J.

Action by Ole Hanson against Otto Carlblom. Judgment for defendant and plaintiff appeals.

Reversed.

O. S. Sem, for appellant.

This is an action in equity to renew and perpetuate a judgment and as there are no facts in dispute there is nothing for a jury. *Woodbridge v. Austin*, 47 N. W. 876.

A. G. Divet, for respondent.

An action upon a judgment of another court is an action for a debt and is but one for the recovery of money. *Andrus v. Montgomery*, 19 John. N. Y. 162; *Clark v. Goodwin*, 14 Mass. 237; *Stearns v. Fisher*, 30 Vt. 198; *Ames v. Hoy*, 12 Cal. 11; *Daudio v. Doll*, 2 Johns, N. Y. 98; *Hole v. Angell*, 20 Johns 341; *Townsend v. Carman*, 6 Cowan 695.

There is no action known to our law to revive or perpetuate a judgment, and if there were this is not one. *Mawhinney v. Doane*, 20 Pac. 488; *Eldredge v. Aultman, Miller & Co.*, 53 N. W. 1008.

The defendant being entitled to a jury trial, this court cannot render a judgment against him.

PER CURIAM. The plaintiff brought this action in district court to recover a balance due upon a judgment rendered in justice's court. Over the defendant's objection, the case was tried to the court without a jury, under section 5630, Rev. Codes 1899, and resulted in findings against the plaintiff and a judgment dismissing his action. He has appealed from the judgment, and in a statement of case containing all of the evidence offered has demanded a retrial of the entire case in this court, under the provisions of the above section.

We are unable to retry the case, and for reasons which are fundamental. The action is at law for the recovery of money only, and was triable to a jury as a matter of strict legal right. The answer presents no equitable issues whatever. The statement of case shows that the defendant demanded a jury trial. This he was entitled to, and his right thereto was not waived. On the contrary, it was insisted upon in the district court, and is again urged in this court. Upon this state of facts the trial court has no authority of law to try the case without a jury, and for the same reason this court is also without authority to enter upon a retrial. The record presents a mistrial similar to *Peckham v. Van Bergen*, 8 N. D. 595, 80 N. W. 760.

The district court is directed to vacate the judgment and order a new trial. Neither party will recover costs on this appeal. All concur.

(100 N. W. 1084.)

PETER NELSON v. OLAF L. GRONDAHL.

Opinion filed September 10, 1904.

Notes — Presentment at Place of Payment Charges Endorser.

1. Where a promissory note expresses on its face that it is payable at a certain store, a presentment of such note at such store for payment on the day of its maturity is a proper place for presentment to charge an indorser.

Presentment — Parol Evidence May Supplement Notary's Certificate.

2. Oral testimony is admissible to show facts occurring on a presentment of a note for payment which are not stated in the notary public's certificate of presentment.

Presentment at Place of Payment Renders Demand on Maker Unnecessary.

3. Where a note specifies on its face the place where it is payable, and is there presented for payment, no personal demand on the maker of the note is necessary.

Evidence — Proof of Invariable Practice May Supply Defect in Certificate of Protest.

4. A notary public's testimony that he invariably presented notes for payment at the place where they were made payable, is admissible to establish the place of presentment, where the notary's certificate of protest fails to show the place of presentment, and the notary has no independent recollection of the specific presentment evidenced by his certificate.

When Judgment Non Obstante Is Reversed, Case Will Be Remanded to Perfect Motion for New Trial Asked in Connection Therewith.

5. On the reversal by this court of a judgment notwithstanding a verdict, the cause will be remanded to the district court, with leave to the respondent to perfect a motion for a new trial, in cases where he asked for a new trial in connection with the motion for judgment notwithstanding the verdict.

Appeal from District Court, Cass county; *Pollock*, J.

Action by Peter Nelson against Olaf Grondahl. Judgment for defendant and plaintiff appeals.

Reversed.

H. R. Turner, for appellant.

The notary's certificate recites that presentment was made and the instrument set out in such certificate shows where it was payable, this is sufficient to show that presentment was made where the note was payable. *Ashe v. Beasley*, 6 N. D. 191, 69 N. W. 188.

Benton, Lovell & Holt, for respondent.

If a bill is not payable at a particular place, it need not be stated in the notary's certificate where it was presented and demands made; if payable at a specified place, the certificate is insufficient if it fails to show a presentment and demand there. 2 Daniels on Negotiable Instruments, section 952; *Gage v. Dubuque*, etc., 77 Am. Dec. 145; *People's Bank v. Brooke*, 7 Am. Rep. 11; *Duckert v. Von Lileinthal*, 11 Wis. 56.

The notary's certificate should have been excluded, as it did not state to whom the presentment was made, and it contains nothing from which such name can be inferred. *Nave v. Richardson*, 36 Mo. 130; *Duckert v. Von Lileinthal*, supra.

Neither the certificate nor the testimony shows a demand and presentment, and the indorser is not liable.

MORGAN, J. This action is brought against the defendant as indorser of a promissory note of which he was the payee. The plaintiff, in his complaint, alleges that one Steffes made and delivered such promissory note to the defendant, and that the defendant duly indorsed and transferred it to the plaintiff for value, and that the note was duly presented for payment when due, and payment refused. The defense attempted to be proven at the trial was that the note was not presented for payment in the manner provided by law. At the close of the taking of the testimony the district court directed a verdict for the plaintiff for the sum of \$339.84, the amount claimed to be due in the complaint, and denied defendant's motion to direct a verdict. The defendant thereafter made a motion for judgment notwithstanding the verdict, on grounds stated, or for a new trial on account of errors occurring at the trial and the insufficiency of the evidence to sustain the verdict. The motion for judgment notwithstanding the verdict was granted by the court, and the appeal is from the judgment entered on such verdict. A statement of the case was settled, specifying the errors relied on.

The only specification of error made on this appeal is that the court erred in granting the motion for judgment notwithstanding the verdict. The question raised by such specification is that there is no evidence showing that the note was presented for payment when it became due, as is required by the statute, before an indorser can be held liable under his indorsement. Section 70, c. 100, Rev. Codes 1899. The certificate of the notary who protested the note for nonpayment is in evidence, and recites that "I, * * * did present the note hereto attached, * * * and demanded payment thereof, which was refused." The certificate is silent as to the place of presentment and as to the person to whom the presentment was made. The note was, by its express terms, made payable to Grondahl, the defendant, "at his store in Fargo, North Dakota." The respondent contends that the certificate of the notary is of itself insufficient to show a proper presentment of the note for payment to the maker, and that the evidence, outside of the certificate, is not competent to prove that the note was presented for payment as required by the terms of the statute. Section 73 of the Negotiable Instruments Law of 1899 (Civ. Code, p. 1048) provides that "presentment for payment is made at the proper place where a place of payment is specified in the note and it is there presented." Section 72 of the same law provides that presentment for payment is sufficient when made at the proper place to the person primarily liable on the instrument, or, if he is absent or inaccessible, to any person found at the place where presentment is made. The trial court granted the motion for judgment notwithstanding the verdict on the ground that the notary's certificate did not show presentment of the note for payment at the place where the note was, by its terms, made payable, and that the notary's evidence of that fact was not competent to prove such presentment, he having stated that he had no independent recollection of the fact of such presentment. If the fact of presentment for payment, as required by the statute, is supported by any competent evidence that reasonably tends to show due presentment, the granting of the motion for judgment was erroneous. The notary was called as a witness, and testified that he recollected that the note was by him presented for payment; that he had no independent recollection of the fact, but that he so testified from an inspection of his certificate stating the fact. He further testified that in cases where notes specified the place where payment was to be made he

presented them at that place, and that he did so in every instance. Whether this evidence, in addition to the certificate, is competent, and sufficient to show presentment for payment at the proper place in accordance with the statute, is the only question arising on the appeal.

It is first claimed that there is no evidence that the note was presented to the person primarily liable on the note—that is, the maker. The certificate does not state the name of the person to whom it was presented, and the notary does not give the name of the person in his testimony. A presentment at the bank where a note is payable is a sufficient presentment to the maker, although the name of the person to whom presented is not given. It is held to have been made to some person connected with the bank. This is expressly held in *Ashe v. Beasley*, 6 N. D. 191, 69 N. W. 188. If the notary's evidence is receivable, it brings the evidence in this record within the rule stated in *Ashe v. Beasley*, *supra*, and is sufficient to show presentment at the store where the note was made payable, and to a person connected with such store. See *Douglass v. Bank of Commerce* (Tenn.) 36 S. W. 874; 1 *Daniel*, *Neg. Inst.* (5th Ed.) section 635. In such cases no personal demand on the maker is necessary. He is primarily liable on his promise to pay. Section 70, *Neg. Inst. Law* 1899 (Civ. Code, p. 1048.) A presentment is necessary in order to fix the liability of the indorser, which is a conditional obligation to pay the note if not paid at maturity by the maker. If a maker stipulates to pay at maturity at a specified place, and the note is there presented for payment at its maturity, and payment refused or not made, the liability of the indorser is fixed after notice to him, although there was no personal demand made on the maker. *Pearson v. Bank of the Metropolis*, 1 Pet. 89, 7 L. Ed. 65; *State Bank v. Hurd*, 12 Mass. 172; *Whitwell v. Johnson*, 17 Mass. 449, 9 Am. Dec. 165; *Meyer v. Hibsher*, 47 N. Y. 265. A presentment at the store was therefore sufficient to bind the indorser after notice to him of the fact. It remains to be determined whether the evidence of the notary was admissible to supply facts that occurred in reference to the presentment that were omitted from the recitals of this certificate. It is well settled that the facts stated in the certificate of protest of promissory notes may be supplemented by other facts that transpired, and that such other facts may be shown by the oral testimony of the notary or by other testimony. *Ashe v. Beasley*, *supra*; *Seneca County Bank v. Neass*, 5 Denio, 334; *Daniel*, *Neg.*

Inst. (5th Ed.) section 969, and cases cited. On this question the respondent does not contend that the defects of the notary's certificate may not be supplied, but he earnestly contends that there is no evidence of presentment at the proper place, because the notary testifies that he has no independent recollection of such fact aside from the certificate. Respondent contends that the notary's evidence that he presented notes for payment in every instance at the place where payable is inadmissible merely as a statement of his custom unaccompanied by some recollection of the fact. We agree that on authority and principle the evidence should be held admissible in cases like the one under consideration. The evidence objected to in this case is not merely the statement of the notary's custom only. He had his certificate of protest before him, from which he was able to say that a presentment was made by him of the note described. The fact of a presentment was established by the certificate in a general way, but not definitely. Whether the presentment was made at a right place was not stated nor established thereby. The certificate showed some kind of a presentment, but one not necessarily legal or proper under the statute. The bare allegation that the note was presented for payment is not equivalent to certifying that the note was presented at the place where it should have been done. The certificate of the notary is evidence only of facts stated therein, and it will not be enlarged by indulging in presumptions. The facts must be stated, and, if stated, the certificate is *prima facie* evidence that the facts properly a part of such certificate are true. *People's Bank v. Brooke*, 31 Md. 7, 1 Am. Rep. 11; *Duckert v. Von Lileinthal*, 11 Wis. 56; *Magoun v. Walker*, 49 Me. 419; *Insurance Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888. The witness' invariable practice was proper evidence to sustain and to supplement the statements of the certificate that presentment had been made. In *Eureka Ins. Co. v. Robinson*, 56 Pa. 256, 94 Am. Dec. 65, it is said: "We think it not uncommon in practice to corroborate the defective memory of a witness by proof of what was his habit in similar circumstances. Thus a subscribing witness to a will or a bond, if unable to recollect whether he saw the testator or obligor sign the instrument, or heard it acknowledged, is often permitted to testify to his own habit never to sign as a witness without seeing the party sign whose signature he attests, or hearing that signature acknowledged. And it seems to be persuasive and legitimate 'supporting' evidence." See, also, *Flack v. Green*, 3 Gill & J.

474; *Miller v. Hackley*, 5 Johns. 375, 4 Am. Dec. 372; *Gillette on Indirect and Collateral Ev.* section 68; *Martin v. Smith* (Mich.) 66 N. W. 61; *Seneca County Bank v. Neass*, supra; *Lindenberger v. Beall*, 6 Wheat, 104, 5 L. Ed. 216; *State v. Rawls*, 2 Nott & McC. 331. The testimony was therefore competent to support or corroborate the notary's evidence that he recollected presenting the note for payment, and, together with the certificate, was sufficient to take the case to the jury on the question of due presentment of the note to the maker for payment.

The defendant included in his motion for judgment notwithstanding the verdict an alternative motion for a new trial, and gave notice of intention to move for a new trial, and therein specified the grounds thereof. Having prevailed in the court below on his motion for judgment notwithstanding the verdict, the motion for a new trial was not perfected. Leave to do so after filing the remittitur in the clerk of the district court's office is granted. *Kreatz v. St. Cloud School District* (Minn.) 81 N. W. 533. If such motion is not made, judgment is directed to be entered on the directed verdict for the plaintiff.

The judgment is reversed, and the cause remanded for further proceedings. All concur.

(100 N. W. 1093.)

STATE EX REL POUL V. McLAIN.

Opinion filed February 15, 1905.

Complaint Charging Offense Upon Information and Belief Insufficient.

1. A criminal complaint wherein the facts constituting the crime charged are stated upon the information and belief only of the complaining witness is not sufficient to justify the issuance of a warrant of arrest.

Furnishing Bail, Procuring Adjournments and Taking Change of Venue Waive Objections to Jurisdiction.

2. Although the arrest of the defendant upon a magistrate's warrant was illegal, because there was no sufficient showing of probable cause upon oath, the defendant waived all objections to the jurisdiction of the magistrate to proceed with the preliminary examination by giving bail, procuring adjournments of the hearing, and taking a change of venue without objection to the validity of the arrest.

Where the Accused Has Given Bail and Fails to Appear But Is Represented by Counsel, He Cannot Object to Proceedings Had in His Absence.

3. Section 7960, Rev. Codes 1899, which provides that the witnesses upon a preliminary examination of a person accused of crime must be examined in the presence of the accused, guaranties to the accused the right to confront the witnesses against him at such hearing; but if the accused has given bail for his appearance before the magistrate at a time and place fixed for the hearing, and neglects, without excuse, to personally appear, but is represented by counsel, he cannot impeach the commitment because the magistrate, at the stated time and place, proceeded to hear the evidence in the absence of the accused, but in the presence of the defendant's counsel.

Application by the state. on the relation of John Poul, for a writ of habeas corpus to John McLain, sheriff of Ramsey county.

Denied.

L. N. Torson and *A. M. Christianson*, for petitioner.

J. F. Philbrick, Assistant Attorney General, for the State.

INGERUD, J. This is an original application for a writ of habeas corpus, which was presented to this court after a denial of the application by Judge Cowan, of the second judicial district, wherein the petitioner is confined. It appears from the petition that on December 12, 1904, one George W. Frame, a justice of the peace of Pierce county, issued a warrant for the arrest of this petitioner on a charge of maintaining a common nuisance, which warrant was issued upon a complaint made and filed by B. L. Schuman, the state's attorney of that county. The facts constituting the crime charged are stated upon information and belief of the state's attorney, and the complaint is verified upon the information and belief only of the affiant. The defendant was arrested pursuant to the warrant and brought before the justice on the 12th of December, 1904, and the hearing was adjourned at defendant's request to the following day, and the defendant gave bail for his appearance at that time. At the time fixed by the adjournment the hearing was again adjourned on the application of the state, without objection from the defendant, to December 21st. On that day the hearing was again adjourned, on defendant's application, to December 24th. On that day the defendant appeared with his attorney, and filed an affidavit in support of his demand for a change of venue, and the case was transferred to Hans Fosser, the nearest justice. When the papers were received by Justice Fosser, which was on the same day

the change of venue was granted, he fixed 2 o'clock of the same day for the hearing, and notified the defendant's attorney. At that time defendant's attorney appeared and objected to the proceedings, and moved the dismissal thereof on the ground that no sufficient notice of the time fixed for the hearing had been served, and that the court had no jurisdiction of the person of the defendant. The specific jurisdictional objection, however, was not stated. The motion was overruled, and the defendant was produced in court by the sureties on his bail bond. The hearing was then adjourned to December 29th, and the defendant again furnished bail for his appearance at the adjourned date. On December 29th the hearing was again adjourned to December 31st by reason of defendant's illness, which was evidenced by a physician's certificate. On December 31st, at the time fixed by the adjournment, the defendant's attorney appeared, and again demanded a continuance on the ground that the defendant was ill, but furnished no evidence in support of his application. The request for a continuance was denied. Thereupon defendant's attorney objected to the jurisdiction of the justice, and demanded the dismissal of the proceedings, upon the ground that the complaint had been made upon information and belief, and was not properly verified. The objection was overruled, and the justice proceeded to hear the evidence in the absence of the defendant, and, after the hearing, made an order committing the defendant to answer the charge set forth in the complaint at the next term of the district court, bail being fixed at \$800. The defendant is now confined in the jail at Devils Lake, in Ramsey county, pursuant to this commitment; an order having been made by the court for his removal to that county for safekeeping, there being no suitable jail in Pierce county.

Upon these facts the petitioner claims that he is unlawfully in custody, and that the commitment under which he is held is void, for two reasons: First, the justice never acquired jurisdiction of the proceedings or the person of the defendant for any purpose, because the warrant was not issued upon a showing of probable cause; second, the evidence upon which the justice made the order of commitment was taken in the absence of the defendant. We are agreed that neither of these propositions can be sustained, and hence the petition does not show that the petitioner is unlawfully restrained.

The Constitution (section 18) prohibits the issuance of any warrant except "upon probable cause supported by oath or affirmation." The complaint in this case, being made upon information and belief, merely, was not a sufficient showing of probable cause to authorize the justice to issue the warrant. *State v. McGahey*, 12 N. D. 535, 97 N. W. 865. If the defendant had made seasonable objection to the proceedings upon this ground, the objection would have been sustained; but, the provision in question being a provision designed for the protection of the person sought to be arrested, he has it in his power to waive its protection. By voluntarily furnishing bail without objection, and seeking and obtaining repeated continuances and a change of venue, it is perfectly clear that he has most emphatically waived any objection which he had to the institution of the proceedings without a sufficient showing of probable cause. *People v. Smith*, 1 Cal. 9; *State v. Blackman*, 32 Kan. 615, 5 Pac. 173; *State v. Longton*, 35 Kan. 375, 11 Pac. 163; *State v. Allison*, 44 Kan. 423, 24 Pac. 964; *Monroe v. City*, 44 Kan. 607, 24 Pac. 1113, 10 L. R. A. 520; *State v. Barr*, 54 Kan. 230, 38 Pac. 289; *In re Cummings*, 11 Okl. 286, 66 Pac. 332; *Lewis v. State*, 15 Neb. 89, 17 N. W. 366; *State v. Jones*, 24 Mich. 215; *People v. Dowd*, 44 Mich. 488, 7 N. W. 71.

The petitioner is not in a position to complain because the examination of the witnesses took place in his absence. Section 7960, Rev. Codes 1899, provides that upon a preliminary examination, where the party is charged with the commission of an offense, "witnesses must be examined in the presence of the defendant and may be cross-examined in his behalf." It is contended in behalf of the petitioner that by reason of this provision the magistrate had no jurisdiction whatsoever to hear any evidence in support of the complaint after the defendant had been arrested unless the defendant was personally present during the examination of the witnesses. Section 8503, Rev. Codes 1899, directs that the provisions of the Code of Criminal Procedure, of which section 7960 is a part, shall be liberally construed with a view to promote its objects, and in furtherance of justice." The question is, must the court adhere to the literal wording of the statute, however absurd the results may be, or shall the court consider the object sought to be attained by the statute, and give the statute such construction as will accomplish that object and promote justice? It is very plain that the object of this statute is to give the defendant the right to see, hear,

and cross-examine the witnesses produced against him by the state. If the defendant is in custody, he must be brought into the presence of the magistrate, and the latter shall hear no evidence in support of the charge except such as is produced while the defendant has the opportunity to see and hear the witnesses, and cross-examine them, either by himself or his counsel. If the defendant has secured his freedom from restraint by giving bail, he has expressly agreed to be present in court at such time and place as the hearing is to be had, where the witnesses against him will be present. If he does not keep his promise and appear, it is his own fault, and he has not been deprived of any right; and, if he has lost any opportunity or advantage which the law accords, he ought not to be heard to urge his own default to thwart the ends of justice.

It is familiar law that in case of felony all proceedings after indictment must be had in the presence of the accused. It has become well-settled law by the great weight of modern authority that one who voluntarily absents himself from the court during the progress of the trial cannot urge his absence to set aside a verdict of guilty. *State v. Kelly*, 97 N. C. 404, 2 S. E. 185, 2 Am. St. Rep. 299; *Commonwealth v. Andrews*, 97 Mass. 543; *Fight v. State* (Ohio) 28 Am. Dec. 626; *Price v. State*, 36 Miss. 531, 72 Am. Dec. 195; *Hill v. State*, 17 Wis. 675, 86 Am. Dec. 736; *Lynch v. Commonwealth*, 88 Pa. 189, 32 Am. Rep. 445; *Wilson v. State*, 2 Ohio St. 319; *State v. Reckards*, 21 Minn. 47; *Warren v. State* (Ark.) 68 Am. Dec. 214. See, also, cases cited in general discussion of this subject in note to case last cited.

We are clearly of the opinion that section 7960 simply makes it the duty of the magistrate to afford the defendant the right to confront the witnesses against him, and that if the defendant is out upon bail, and refuses or neglects without cause to appear at the time fixed for the hearing, he has waived his right to personally confront the witnesses. In this case there is no showing that the petitioner could not have been present at the time of the hearing. It must therefore be presumed that he voluntarily absented himself from the examination. To hold that the right to examine the witnesses depends upon the personal presence of the accused when he is at liberty on bail would lead to the absurd result that the accused would have it in his power to indefinitely postpone the examination by voluntarily absenting himself from the hearing either before its commencement or during its progress. Section

7960 guarantees to an accused person the right to confront and cross-examine the witnesses against him at a preliminary hearing. If that right has not been denied to the accused, he will not be heard to object to the regularity of the proceedings that he did not enjoy the right because he voluntarily chose not to avail himself of it.

The prayer of the petition is denied. All concur.
(102 N. W. 407.)

SAMANTHA CUGHAN v. BENNIE LARSON, HENRY CHRISTOFFERSON AND ——— CHRISTOFFERSON (whose first name is to this plaintiff unknown), AND ALL OTHER PERSONS UNKNOWN CLAIMING ANY ESTATE OR INTEREST IN OR LIEN OR INCUMBRANCE UPON THE PROPERTY DESCRIBED IN THE COMPLAINT, AND THEIR UNKNOWN HEIRS.

Opinion filed September 10, 1904.

Forfeiture of Contract of Purchase — Time Essence of Contract.

1. A forfeiture of a written contract of sale of real estate by the vendor upon defaults in payments required to be made "in the manner and at the times specified for their payment," and the amounts to be paid being evidenced by promissory notes due on fixed dates, will not be upheld in a court of equity, where the evidence shows that time had not been treated by the vendor as of the essence of the contract, in respect to the defaults relied on for a forfeiture.

Contract Forfeited Only for Defaults Specified Therein as Grounds for the Forfeiture.

2. Where a contract for sale of land specifies what defaults shall be grounds for the forfeiture of the same by the vendor, a forfeiture of such contract upon other grounds, not included as grounds for forfeiture in the contract, will not be upheld. Such forfeitures are sustained only when the parties have contracted for such forfeitures, and the terms of the contract will not be extended to sustain forfeitures.

Modification of Contract by Parol.

3. Under section 3936, Rev. Codes 1899, providing that "a contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise," a written contract for the sale of real estate cannot be modified by an unexecuted oral agreement, although the modification pertains only to the performance of the contract.

Appeal from District Court, Richland county; *Cowan, J.*

Action by Samantha Cughan against Bennie Larson and others. Judgment for defendants, and plaintiff appeals.

Reversed.

Charles E. Wolfe and Purcell, Bradley & Divet, for appellant.

Burden is upon defendant to show the authority of plaintiff's agent in the performance of acts by which he seeks to bind the plaintiff. *Mechem on Agency*, section 276; *Ritz v. Martin*, 74 Am. Dec. 215; *Rice v. Peninsular Club*, 17 N. W. 708; *Pursley v. Morrison*, 63 Am. Dec. 424; *Rossiter v. Rossiter*, 24 Am. Dec. 62.

Plaintiff could dispute the validity of an oral contract modifying a written one any time before it was executed. There was never a legal assignment of the contract of purchase, because the agent had no authority to consent to a modification of it, and there was no written contract of alteration, or executed oral contract. *Foster v. Furlong*, 8 N. D. 282; 78 N. W. 986.

Defendant Larson contracted orally with Munson for sale of lands by Larson to Munson, to which contract plaintiff orally assented. This agreement, whether treated as a modification of the original agreement of Larson, or as an original contract on the part of plaintiff, is clearly void, and unenforceable as against her. This challenges the agency of R. H. Cughan and his implied power to bind the plaintiff. He was only the manager of the plaintiff's business relative to her farm and to collect the moneys on the Larson contract. He had no authority to commute or compromise the debt due under the contract, change the rate of interest, or the installment payments into a lump sum. Authority to collect and receive payment does not carry with it authority to commute or release a debt or change terms of payment. *Storey on Agency*, section 99; *Martin v. U. S.*, 15 Am. Dec. 129; *Ritch v. Smith*, 82 N. Y. 627.

If an agent has authority to receive payment upon an obligation it does not authorize him to receive it before it is due. *Smith v. Kidd*, 68 N. Y. 130; *Storey on Agency*, 98; *Hakes v. Myrick*, 28 N. W. 575.

Change of time of payment of a written contract is such an alteration of its terms as to bring it within section 3936, Rev. Codes, and if made orally is void and unenforceable, even if based upon a consideration. *Foster v. Furlong*, 8 N. D. 282, 78 N. W. 986.

If Munson seeks to enforce the original contract of Larson, he has not pleaded it, nor offered to perform it according to its terms.

Besides the contract was cancelled before the alleged assignment to Munson. If he seeks to enforce the contract set forth in the answer, it is void, as being an oral contract with an agent, whose authority for the sale of an interest in real property was not in writing. The original contract between plaintiff and Larson was forfeited before the assignment to Munson. While time is not expressly made the essence of the contract, it was clearly the purpose of the parties to make it so. The provision need not be in any particular form. *Fargusson v. Talcott* 7 N. D. 183, 73 N. W. 207.

Larson seeded a crop in 1902, and instead of performing the condition of delivering the crop as per contract, he sold and assigned all his interest therein, and thus put it out of his power to fulfill his contract. This was a default going to the very vitals of the contract, by depriving her of the right to security upon the crop, which Larson left without giving as required by the contract that called for a chattel mortgage on each year's crop. This warranted plaintiff in ousting Larson and retaking the land.

Morphy & Propper and John E. Greene, for respondents.

A provision against the assignment of a contract without the vendor's consent may be waived. *Peter v. Canfield*, 42 N. W. 125; *Ross v. Page*, 11 N. D. 458, 92 N. W. 822.

It is not competent to set up an oral contract in bar of plaintiff's claim, not alleging defendant's performance or readiness to perform. *Anderson v. Moore*, 33 N. E. 848; *Lowe v. Hamilton*, 31 N. E. 1117; *Long v. Hartwell*, 34 N. J. L. 125; *Cummings v. Arnold*, 3 Neb. 486; *Brown on Statute of Frauds*, sections 424, 426.

Plaintiff having acquiesced in Larson's defaults for some time, they were fully waived by her. *Robinson v. Trufant*, 56 N. W. 769; *Fargusson v. Talcott*, 7 N. D. 183, 73 N. W. 207; *Boyum v. Johnson*, 8 N. D. 306, 79 N. W. 149; *Kicks v. State Bank of Lisbon*, 12 N. D. 576, 98 N. W. 408; *Russell v. Timmins*, 13 N. D. 488, 99 N. W. 48.

MORGAN, J. The plaintiff alleges in her complaint that she is the owner in fee simple and entitled to the possession of the real estate described in the complaint, and that the defendants claim certain estates, interests, or liens upon said real estate adverse to the plaintiff's interest and title. Larson and the Christoffersons are named as party defendants. This action is brought against them and all other persons unknown, claiming any interest or estate

or lien in the premises described. The defendants Larson and the Christoffersons did not appear in the action, but one M. N. Munson appeared, and answered as a person claiming an estate or interest in the premises. Munson sets up such interest as a counterclaim, and alleges that on and prior to the 13th day of January, 1902, the said plaintiff was not the owner in fee of the premises described, but that her ownership and title to the said lands was subject to a contract of sale of such lands between her and one Bennie Larson; that on said 13th day of January, 1902, the said contract between the plaintiff and said Larson was in full force and effect; that on said day the defendant Larson sold to him the lands described, and that this defendant then and there agreed to pay the sum of \$8,640 for said lands; that at the time of such sale there was due to the plaintiff upon the contract between her and said Larson the sum of \$7,927.09, which said sum was then and there settled and agreed upon by the defendant Larson and the plaintiff in this action as the amount due upon said contract; that said plaintiff assented to the making of said contract between Larson and this defendant, and agreed to execute to this defendant a warranty deed of said premises upon the payment to her of the amounts due upon said contract. The answer further alleges that it was further agreed between the plaintiff and Larson and this defendant that the plaintiff would accept from this defendant the sum of \$3,127.09 in cash, and would accept a first mortgage on said property to secure the balance due her, to wit, the sum of \$4,800, which said mortgage was to be upon the premises described, and to bear interest at the rate of 6 per cent per annum, payable on or before six years from the date of the said contract; that the balance of said purchase money, to wit, the sum of \$712.91, was to be paid to the defendant Larson by this defendant; that, in reliance upon said contract between this defendant and said Larson, and in reliance upon the assent of said plaintiff thereto, this defendant paid to the said Larson on account of the purchase price of said real estate the sum of \$250; that the defendant has at all times been ready and willing to pay to said plaintiff said sum of \$3,127.09, and has been ready and willing at all times to execute, and has executed his mortgage upon said real estate for the sum of \$3,500, and has agreed to assume and pay an existing mortgage on said premises of \$1,300, but that said plaintiff refuses to accept such mortgage, and refuses to accept said sum of money, and refuses to execute and deliver

to this defendant a warranty deed as agreed to by her in said contract between said Larson and this defendant. The defendant prays that the contract between him and said Larson be specifically performed upon the payment by him of said sum of \$3,127.09, with interest thereon from the 13th day of January, 1902, and the delivery by him of a mortgage upon said premises for said sum of \$3,500, pursuant to such agreement. The plaintiff replied, and alleged that she is the owner of said premises, free from all liens and incumbrances thereon, by virtue of any contract between her and said Larson or in any other manner. The contract between the plaintiff and said Larson is set out in full in the reply. It is a contract of sale of said lands, and an agreement to convey the same to Larson upon his complying with the terms thereof, and upon his paying the purchase price of said premises, to wit, the sum of \$8,700. The said purchase price is to be paid in annual payments, as evidenced by notes executed and delivered to the plaintiff by said Larson. Said notes and said purchase price draw interest at the rate of 8 per cent per annum. Said contract further provided that Larson should execute a chattel mortgage upon all the crops growing upon said premises to secure the amount due upon said contract each year. The contract further provided that the defendant Larson should pay all taxes due upon said premises on or before the day when such taxes should by law become delinquent; and also provided that it could not be assigned by said Larson to any person for any purpose without the written consent of the plaintiff first to be indorsed thereon. The contract provided that, if default should be made in any of its terms, or if said Larson should fail to pay any of the sums of money specified in the contract to be paid, or the interest thereon at the times or in the manner specified in the contract for the payment thereof, or if Larson should fail to pay said taxes as therein provided, or should fail to perform any of the conditions of said agreement, then and in that case the plaintiff might declare such contract forfeited, and might re-enter and take possession of the premises; that Larson agreed in the contract that upon any such defaults he would, within 10 days after being notified by said plaintiff of the forfeiture of said contract, peaceably yield and surrender up the possession of said premises, and the whole thereof. The reply further alleges that said Larson failed to make the payments agreed upon in said contract, and that on January 13, 1902, Larson was in default by reason of not having made such payments and by reason

of not having paid the taxes due on the land for the year 1901; and that such defaults continued up to the 13th day of May, 1902, at which date the plaintiff notified the defendant Larson that she had declared a forfeiture of the contract by him, and that said contract was by her terminated on account of such defaults. The declaration of forfeiture was in writing, and alleged as grounds for forfeiting the contract the following: (1) Failure to pay notes becoming due on the following dates, to wit, April 1, 1898, November 1, 1898, November 1, 1899, November 1, 1900, November 1, 1901; (2) failure to pay the 1901 taxes when they became delinquent; and (3) that Larson had abandoned the premises and the contract, and had left the country. The trial court found for the defendant Munson, and judgment was entered upon the findings. It was adjudged and decreed that the contract as shown by the evidence offered and received at the trial be specifically performed by the plaintiff. The plaintiff has appealed from this judgment, and requests a review of all issues involved in the case.

Two questions are presented for decision: (1) Is the contract, as alleged to have been modified, enforceable by specific performance? (2) Was the contract between plaintiff and Larson forfeited, so as to terminate Larson's interest therein? In the original answer the defendant Munson alleges a sale of the land described to him by Larson. After judgment was entered for the defendant, he asked for an amendment to the answer to conform to the evidence received at the trial. The amendment asked for alleged an assignment of the contract to the defendant by Larson in place of an allegation that Larson sold the land to the defendant. The amendment was allowed, and it is now claimed that it was error to do so. In the disposition to be made of the case it becomes immaterial whether the amendment was properly allowed or not. In no event can the defendant Munson be granted the specific performance prayed for under the evidence produced at the trial. That evidence shows that Munson is relying upon a modification of a written contract for a sale of land by a subsequent parol contract. The original contract was for the sale of the land at a fixed price payable at fixed times, payment to be secured by a lien upon the land and by chattel mortgages upon the crops, and a deed to be given to Larson upon full payment of the price. The new contract provided for payment of a fixed sum in cash and for the giving of a deed by plaintiff to Munson, and a mortgage back by Munson for the

remainder of the purchase price, payable at a different time and different rate of interest than originally provided for by the contract. The contract was of different terms in other respects unnecessary to mention. The contract was not executed or performed as between plaintiff and Munson in any particular. It was nothing more than a mutual agreement to do certain matters in a manner entirely at variance with the original agreement. Such a contract is not enforceable by specific performance. The agency of R. Cughan for the plaintiff is challenged as not broad enough to empower him to contract in reference to a modification of the contract in the manner attempted. Whether he had such authority or not we need not determine, as the modified contract would not be enforceable as made if he had such authority; nor would it be enforceable if it had been made by the plaintiff herself in parol, unless the new contract was followed by performance. Section 3936, Rev. Codes 1899, provides: "A contract in writing may be altered by a contract in writing or by an executed oral agreement and not otherwise." This section has been construed by this court to prohibit an oral extension of the time of payment of a promissory note by an agreement to do so that is unexecuted by either party. *Foster v. Furlong*, 8 N. D. 282, 78 N. W. 986. Such being the law in respect to the contract involved in that case, no good reason can be given why that case is not controlling in this case. In fact, this case presents stronger reasons for the strict application of the section, as the contract here involved is one within the statute of frauds, and of necessity must be in writing if unperformed. The section in question, however, is construed by the courts as applicable to all contracts in writing, alike whether within the statute of frauds or not. In *Armington v. Stelle* (Mont.) 69 Pac. 115, 94 Am. St. Rep. 811, the Supreme Court of Montana said, in construing a similar section: "The principle embodied in this provision applies to all kinds of contracts in writing, whether they are required by law to be in writing or not. * * * It is a distinct departure from the common-law rule, which permitted parties at their pleasure to alter by oral agreement, whether executed or executory, any contract which was not required to be evidenced in writing. The only exception recognized is the case in which the subsequent oral agreement has been executed by one or both of the parties." See, also, *Erenberg v. Peters*, 66 Cal. 114, 4 Pac. 1091; *Benson v. Shotwell*, 103 Cal. 163, 37 Pac. 147; *Mettel v. Gales*, 12 S. D. 632,

82 N. W. 181. The respondent contends that the modification proposed relates solely to the performance of the contract, and is, therefore, not inhibited by that section. But such a construction would be reading into the section an exception not warranted by the language of the section, and one coming within the evil to be guarded against by the enactment of the section; that is, that parties should not be burdened by claims of modified contracts that were never entered into. As stated by the court in *Rucker v. Harrington*, 52 Mo. App. 481: "It is therefore at least equally proper to say that the principal design of the statute was to protect parties from the performance of burdensome contracts which they never made. Therefore, if you may enforce an oral agreement for a substituted performance of a written agreement, you apply the statute to the shadow and withhold it from the substance. Such application of the statute only makes it necessary that parties have a contract in writing. Then, under the guise of performance, the contract enforced is shown by parol." The section announces a general rule in respect to contracts in writing that is generally held by courts to be the rule in case of modification of contracts required to be in writing when no statute similar to section 3936 is in force. *Swain v. Seamens*, 9 Wall, 254, 19 L. Ed. 554. We therefore conclude that the defendant Munson is not entitled to a specific performance of his parol contract.

Is the plaintiff entitled to the possession of the land by virtue of having declared the contract forfeited and terminated as alleged in her reply? The contract provided that plaintiff might declare it forfeited upon default of Larson in making payments of the amounts due on the contract or on the notes, or if taxes were not paid at or before becoming delinquent. No other grounds of forfeiture are therein enumerated, and no others could properly be alleged in the declaration as grounds for forfeiture of the contract. The contract specifies how plaintiff may terminate it, and upon what grounds; and she could not rely on other grounds not mentioned for its forfeiture. Forfeiture of contracts by act of one of the parties is deemed a harsh proceeding, and will not be upheld unless within the terms of the agreement between the parties. In declaring forfeitures, so far as the grounds of forfeiture and procedure are concerned, the terms of the contract govern, and must be followed. *Warvelle on Vendors*, vol. 2, p. 951, says: "But forfeitures are not, and never have been, regarded by the courts with any special

favor; and where a party insists upon a forfeiture he must make clear proof, and show that he is entitled to it. It has ever been regarded as a harsh way of terminating contracts, and for this reason he who seeks to avail himself of the privilege must be held strictly within the limits of the authority which gives the right. The right to declare a forfeiture is derived from the stipulations of the bond or agreement for conveyance, and is reserved ordinarily as an option on the part of the vendor, who, upon failure of the vendee to comply with its terms, may elect to declare the contract at an end." See, also, *Jacobs v. Spalding*, 71 Wis. 177, 36 N. W. 608; *Kerns v. McKean*, 65 Cal. 414, 4 Pac. 404. In this case, the only grounds alleged in the notice or declaration of forfeiture that are provided for in the contract are nonpayment of notes and nonpayment of taxes. The other ground alleged—that is, the abandonment of the contract by Larson and his having absconded—are not specified as grounds for forfeiture of the contract. Hence the plaintiff cannot rely upon them as grounds for terminating the contract, and it will be unnecessary to determine whether such grounds existed or not. The grounds of forfeiture specified in the notice had all been waived by the plaintiff by her delay in not taking advantage of the defaults as they occurred. Only one note had been fully paid since 1897. Notes had fallen due each year since, and the plaintiff had made arrangements with Larson by which the notes were to be paid later. The nonpayment of the note becoming due in November, 1901, was ground for forfeiting the contract, but it should have been promptly acted on as ground for forfeiture. There was no forfeiture attempted until May, 1902. During the time since November, 1901, Larson had cropped the land, in reliance, probably, upon the fact that he would not be forced to give up the land, from his experience in former years. The same may be said of the nonpayment of the taxes of 1901. Plaintiff could not wait until the crop had been put in, and then declare a forfeiture, the grounds of which had existed long before the crop was put in. It has often been held in this state that, before advantage can be taken of existing defaults in this class of contracts by forfeiture, the person seeking the forfeiture must act promptly, and if he does not, the default is deemed consented to and waived. *Fergusson v. Talcott*, 7 N. D. 183, 73 N. W. 207; *Boyum v. Johnson*, 8 N. D. 306, 79 N. W. 149; *Kicks v. Bank*, 12 N. D. 576, 98 N. W. 408; *Timmins v.*

Russell (N. D.) 99 N. W. 48; Robinson v. Trufant (Mich.) 56 N. W. 769; Pier v. Lee, 14 S. D. 608, 86 N. W. 642; Merriam v. Goodlett, 36 Neb. 384, 54 N. W. 686; Phillips v. Carver, 99 Wis. 561, 75 N. W. 432. The contract in this case did not expressly state that time was of the essence of the contract. It simply provided that, if default be made in the payment of sums due as principal or interest "at the time or in the manner herein specified," then forfeiture of the contract could be made. Whether this provision of itself made time an essential element of the contract under section 3916, Rev. Codes 1899, providing that "time is never considered as of the essence of a contract unless by its terms expressly so provided," is extremely doubtful. But we need not determine that question in this case, as it becomes an immaterial one in view of the fact that the matter of time was waived by the plaintiff from the making of the contract until the spring of 1902, when an attempt was made to declare the contract forfeited. The cases already cited show that such a stipulation written in the contract may be waived by the subsequent conduct of the parties, and, if waived, specific performance will be given to the vendee on an offer to comply with the contract by a tender of all amounts due. Warvelle on Vendors, section 818; Am. & Eng. Enc. Law, vol. 26, p. 74, and cases cited; Hall v. Delaplaine, 5 Wis. 206, 68 Am. Dec. 57; Foot v. Bush, 100 Iowa, 522, 69 N. W. 874; Smith v. Mohn, 87 Cal. 489, 25 Pac. 696; Dana v. Investment Co., 42 Minn. 194, 44 N. W. 55.

This disposes of all the issues raised by the pleadings. The plaintiff relied upon an alleged forfeiture for gaining possession. We have seen that the attempted forfeiture was a nullity. The defendant relies upon the oral contract of sale made by plaintiff's agent. We hold that such a contract is of no effect unless performed. The defendant has therefore failed to show grounds for any affirmative relief in his favor. A written assignment from Larson to the defendant Munson was offered in evidence, but the pleadings contain no mention of it, and, its introduction in evidence having been duly objected to, it cannot be considered, as the objection was properly made. The defendant has not attempted to come within the provisions of the original contract in tendering the amount due. The tender was confined entirely to the amount due under the new or modified contract. It follows, therefore, that neither party is entitled to any relief under the present evidence and pleadings.

The judgment will therefore be reversed, and the action ordered dismissed, but without prejudice to the subsequent litigation of any issues which have not been litigated and determined in this action. Plaintiff will recover her costs and disbursements in this court, and the defendant his costs and disbursements in the district court. All concur.

(100 N. W. 1088.)

STATE OF NORTH DAKOTA V. LESLIE R. CARROLL.

Opinion filed October 7, 1904.

Bastardy — Filing of Transcript of Justice Proceedings and Jurisdictional Papers Gives District Court Jurisdiction.

1. The jurisdiction of the district court over the person of the defendant and the subject-matter in bastardy proceedings is complete when the transcript of the proceedings before the justice and the jurisdictional papers filed with the justice are lodged with the clerk of the district court.

When Defendant Furnished to Magistrate Approved Bail, a Formal Order of Commitment Was Unnecessary.

2. In such proceedings, when the defendant furnishes bail, approved by the magistrate under section 7842, Rev. Codes 1899, it is not necessary that the magistrate's transcript of proceedings should show any formal order or judgment holding the defendant for trial.

Affidavit Upon Information and Belief Without Disclosing Grounds Thereof, Is Insufficient in Motion for Continuance.

3. An affidavit for continuance on the ground of the absence of a material witness, which states that the affiant is informed and believes that the absent witness can and will testify to certain facts, but fails to disclose the sources of information or the grounds for such belief, is insufficient.

Appeal from District Court, Ward county; *L. J. Palda, Jr.* Leslie R. Carroll was convicted of bastardy, and appeals. Affirmed.

Le Sueur & Bradford, for appellant.

Where a continuance is asked on the ground of absence of witnesses, and there is a showing of due diligence and that the testimony can be procured for a later date, it is abuse of discretion to refuse

such continuance. *Adams v. Grand Island & W. C. R. Co.*, 72 N. W. 577.

A bastardy proceeding is one under a special statute for a forfeiture or fine sued for in the name of the state for the benefit of a private individual. It should be strictly construed and the statutory method strictly followed to permit a recovery. The justice did not sign his docket. Unless a judgment in writing be made remanding the defendant, and an order of commitment given to the sheriff, unless bail is furnished pursuant to a written order requiring it, the doings of a justice are a nullity. No order being made requiring bail, the defendant was not required to give it, and the fact that he did so does not confer jurisdiction upon the district court, such jurisdiction is acquired only by a compliance with section 7842, Rev. Codes 1899.

James Johnson, State's Attorney of Ward county, for respondent.

The complaint and warrant in bastardy complied with the statute; the arrest and arraignment of defendant before the justice thereunder gave jurisdiction to the justice court of the person of the defendant. He then and there furnished bail for his appearance before the district court, whereupon his undertaking and the complaint, warrant and all papers in the case were transmitted by the justice to the district court, followed by the due appearance of the action upon the calendar of this court. This conferred jurisdiction of the person of defendant and full power to proceed according to law, and the motion to dismiss was properly overruled.

Defendant's affidavit states the person named therein had stated that he had had sexual intercourse with the prosecutrix, and that she had told that a person, other than the defendant, was the father of her child. More than ten months had elapsed since such conversation or alleged intercourse, and the testimony was immaterial. No diligence is shown in procuring the evidence, and no fact stated that was material. Motion for a continuance was properly overruled.

ENGERUD, J. This is an appeal by defendant from a judgment rendered against him in bastardy proceedings. The appellant contends that the judgment should be reversed and the proceedings dismissed because the district court had no jurisdiction, or, if the objection to the jurisdiction is not well taken, a new trial should be

ordered because the trial court erred in denying defendant's motion for a continuance.

The record discloses that a complaint in statutory form was presented to the justice, showing that the defendant was the father of the complaining witness' bastard child; that a warrant in due form was thereupon issued, by virtue of which warrant the defendant was apprehended and brought before the magistrate; that the defendant then furnished an undertaking for his appearance in district court to answer the complaint, which undertaking was accepted by the justice, and defendant released from custody. All the original papers, properly identified, together with a certified transcript of his proceedings, were transmitted by the justice to the district court. The proceeding was placed on the calendar for trial at the next term, and when the case was reached for trial the defendant appeared by counsel, and moved to dismiss the proceeding on the ground that the trial court had not acquired jurisdiction. The specific objection to the jurisdiction urged by defendant's counsel here and in the trial court is that the justice's transcript of his proceedings affirmatively shows that the justice had made no order or judgment holding the defendant to appear for trial in the district court.

The objection is without merit. The justice's transcript is in proper form. It is addressed to the clerk of the district court of Ward county, and purports to set forth all proceedings, and to have annexed thereto all papers filed in the case of the State of North Dakota against Leslie R. Carroll, before John W. Crow, justice of the peace of Ward county, and bears the signature of said justice. It contains "a full, true and correct copy of all docket entries." These entries, after showing the making and filing of the complaint and the issuance of the warrant, read as follows: "Said defendant, Leslie R. Carroll, was placed under arrest and brought before me and was placed under \$500 bonds to appear from time to time before the district court until his case is disposed of." The transcript is verified by an affidavit subscribed by the justice and sworn to before a notary public. The original complaint, warrant and undertaking are attached to the transcript. Appellant asserts that the fact that the name of the justice does not appear below the docket entries on the transcript demonstrates that the justice did not sign the page or pages of the original docket on which these entries appear. Hence the conclusion is deduced that

there was no order or judgment by the justice admitting the defendant to bail, because such order or judgment could only be made in writing entered on the docket and signed by the justice. Our attention has not been called to any statute or rule of law which requires the justice in a bastardy proceeding to attach his signature to the docket entries. Section 7843, Rev. Codes 1899, requires the magistrate to transmit to the district court the undertaking given by the defendant and all the other papers in the case, "together with a transcript of his [the magistrate's] proceedings." The statute does not require the justice to transmit an exact reproduction of the page or pages of his docket on which the entries appear. A copy of the docket entries showing the proceedings had is sufficient. When the defendant is brought before the magistrate in a bastardy proceeding, the defendant's rights and the magistrate's powers and duties are prescribed by section 7842, Rev. Codes 1899. The only right on the part of the defendant is to furnish bail acceptable to the magistrate. The sole power and duty of the magistrate is to admit the defendant to bail, or commit him to custody in default of bail, to await trial in the district court. In this case the record shows that the defendant furnished bail satisfactory to the magistrate. The bail bond itself, as well as the transcript of the proceedings before the justice, show that the bail furnished was satisfactory to the magistrate, both in amount and sufficiency of sureties. The defendant having availed himself of his right to furnish satisfactory bail, there was no order, finding or judgment required of the magistrate except to approve the undertaking. The district court acquired complete jurisdiction over the person of the defendant and the subject-matter of the proceeding when the transcript and accompanying papers were filed with the clerk, and therefore the objection to the jurisdiction was properly denied.

On the day before the trial the defendant applied for a continuance on account of the absence of an alleged witness. The trial court denied the motion, and we think the ruling was eminently right. The only showing in support of the motion was the uncorroborated affidavit of the defendant, in which he stated that he was "informed and believed" that the absent witness could and would give certain testimony. The sources of the affiant's information and the grounds for his belief are not disclosed. The testimony of the absent witness would incriminate the witness himself, and, even if the witness waived his privilege, and his testimony were fully

credited, it would only tend to lessen the weight and credibility of the evidence for the prosecution.

The judgment appealed from is affirmed. All concur.
(101 N. W. 317.)

H. P. LOUGH v. A. A. WHITE.

Opinion filed October 7, 1904.

Appealable Order.

1. An order of the district court dismissing an appeal from a justice's court judgment is not appealable.

Appeal from District Court, Cass county; *Pollock, J.*

Action by H. P. Lough against A. A. White. Judgment for plaintiff; defendant appeals.

Affirmed.

John E. Greene (Benton, Lovell & Holt on brief), for appellant.
Barnett & Reese, for respondent.

PER CURIAM. The defendant has attempted to appeal from an order of the district court dismissing his appeal from a justice's court judgment. Under our statute, as repeatedly held by this court, such orders are not appealable. See *In re Weber*, 4 N. D. 119, 59 N. W. 523, 28 L. R. A. 621; *Field v. Elevator Co.*, 5 N. D. 400, 67 N. W. 147; *Prondzinski v. Garbutt*, 9 N. D. 239, 83 N. W. 23.

The appeal must therefore be dismissed.

(100 N. W. 1084)

STEWART CAIRNCROSS v. O. M. OMLIE.

Opinion filed October 10, 1904.

Appeal — Harmless Error.

1. Reversible error cannot be predicated upon the admission of incompetent evidence of a fact which is otherwise conclusively established and is not controverted upon the trial.

Appeal from District Court, Walsh county; *Kneeshaw, J.*

Action by Stewart Cairncross against O. M. Omlie. Judgment for plaintiff, and defendant appeals.

Affirmed.

Bosard & Bosard, for appellant.

Account books in which the entries are made by the bookkeeper from slips sent up by the clerk selling and delivering the goods are not admissible to prove the account, when unsupported by the evidence of such clerk, that at the time the entries were made upon the slips the goods therein charged were actually delivered. *Swan v. Thurman*, 70 N. W. 1023; *Jackson v. Evans*, 8 Mich. 476; *House v. Beck*, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307; *Thompson v. Porter*, 53 Am. Dec. 653; *Hart v. Kendall*, 82 Ala. 144; *Kent v. Garvin*, 1 Gray, 148; *Harwood v. Mulry*, 8 Gray, 250; *Luse v. Doane*, 38 Me. 478; *Smith v. Sanford*, 12 Pick. 139; *Ingraham v. Bockins*, 9 S. & R. 285, 11 Am. Dec. 730; *Taylor v. Davis*, 52 N. W. 756; *Miller v. Shay*, 145 Mass. 162, 1 Am. St. Rep. 449; *Way v. Cross*, 63 N. W. 691.

Entries in books in the ordinary course of business must be contemporaneous with the facts related, made by the parties having personal knowledge thereof and corroborated by their testimony. *Chaffee v. United States*, 18 Wall. 541 L. Ed. 908; *Maxwell v. Wilkinson*, 113 U. S. 656, 28 L. Ed. 1037; *Bates v. Preble*, 151 U. S. 149, 14 Sup. Ct. Rep. 277; *Putman v. U. S.*, 162 U. S. 687, 16 Sup. Ct. Rep. 923; *Paine v. Sherwood*, 21 Minn. 240.

As a general rule, it is essential to the admissibility of entries made by a living witness that he shall be able to state, that at or about the time the entries were made, he knew their contents and knew them to be true, so that the entries and the testimony of the witness concurrently shall be equivalent to a present affirmation of the truth of their contents. *Kerns v. McKean*, 76 Cal. 87, 18 Pac. 122; *Kerns v. Dean*, 19 Pac. 817; *Dismukes v. Tolson*, 67 Ala. 386; *McDonald v. Carnes*, 90 Ala. 147, 7 So. 919; *Swan v. Thurman*, 70 N. W. 1023; *Ocean Nat. Bank v. Carll*, 55 N. Y. 440; *Union Electric Co. v. Seattle Theatre Co.*, 51 Pac. 367.

Jeff Myers, for respondent.

The ledger being the first book in which the account was attempted to be preserved and the entries having been shown to have been made contemporaneously with the transactions recorded, it is a book of original entries. 9 Am. & Eng. Enc. of Law, 918 (bb). The fact that the entries were made from memoranda kept by salesmen will not destroy its character as a book of original entry. *Id.*

Such a book, by an almost unbroken line of American authorities, is admissible to prove a sale and delivery of goods by shopkeepers. *Id.* page 904.

A settlement of the account was testified to by a witness; this evidence furnishes a sufficient foundation for the introduction of the account on the ledger. *Cumbey v. Lovett*, 79 N. W. 99; *Baxter v. Reynolds*, 70 N. W. 1039.

The answer admits the account and pleads payment and settlement. The sale and delivery of the items were not among the issues in the case, they were, therefore, admitted notwithstanding the general denial. 1 Enc. Pl. & Pr. 804.

If such were the issues made, it was immaterial whether a foundation was laid or not for the admission of the ledger.

YOUNG, C. J. The plaintiff sues to recover the sum of \$392.93, which he alleges is due from the defendant as a balance upon an account for goods sold and delivered to one James McNamara between August 24, 1895, and February 7, 1898, and charged to the account of the defendant at his request. A copy of the account is attached to and made a part of the complaint. The answer includes a general denial, and alleges that during the times in question McNamara was a tenant of the defendant, and cultivated his farm upon shares, under a contract which reserved the title of the crop in the defendant; that defendant agreed with the plaintiff that he would pay for goods delivered to McNamara in 1895 from the latter's share of the crop, and that payment therefor was made; that he made a similar agreement for the year 1897, and "that after the grain was threshed in the fall, and on or about the 12th day of December, 1898, the defendant paid to the plaintiff, out of the said McNamara's share of the wheat, enough money to pay the account which the said McNamara owed the plaintiff, and that said account was settled satisfactorily to the plaintiff." The jury returned a verdict for plaintiff for the full amount claimed. A motion for new trial was made and overruled, and judgment was entered upon the verdict. This appeal is from the judgment, and error is assigned upon the order overruling the motion for a new trial.

The only errors specified as ground for new trial relate to the admission in evidence of certain pages of the plaintiff's ledger in which the account in question was entered. Upon preliminary cross-examination it developed that the ledger entries were made from written slips prepared by the plaintiff's salesmen, and that the bookkeepers who made the ledger entries had no personal knowledge of the correctness of the slips. The evidence was objected to upon the ground that it was "incompetent, irrelevant and

immaterial, and no foundation laid." It is contended that the ledger account is not an account of original entry, and is therefore not admissible. We are agreed that a proper disposition of this case does not call for an opinion upon this question. If it was an error to admit the ledger, it was without prejudice, for the correctness of the account was not in dispute at the trial. The issues of fact actually litigated upon the trial were those presented by defendant's answer, namely, payment, and, incidental to it, the character and extent of the defendant's obligation; that is, whether he was to pay the entire account, or merely the proceeds of McNamara's share of the crops. It is not claimed that the evidence objected to had any bearing upon either of these questions. The correctness of the items of the account was not questioned at the trial. The plaintiff testified to the correctness of the accounts and to the balance claimed to be due. Both McNamara and the defendant were witnesses. Neither of them challenged the correctness of a single item. On the contrary, it appears from their testimony that the defendant paid \$300 upon the account, and that thereafter, for the purpose of making a settlement, he went over the account with the plaintiff and McNamara. The latter claimed to have previously made a number of payments to the plaintiff's son, and produced receipts purporting to have been executed by him. After allowing all payments evidenced by the alleged receipts, there was an overpayment of \$67, and this sum was paid back by the plaintiff to the defendant. Shortly afterward the plaintiff discovered that the receipts were forgeries, and brought this action to recover the balance of the account. At the trial the defendant relied upon the McNamara receipts to support his defense of payment. The jury rejected the receipts as spurious, and found for the plaintiff. The sufficiency of the evidence to sustain this finding is not challenged. Upon this state of facts, it is clear that the evidence in question was not material upon the questions actually litigated. The parties having agreed upon the correctness of the items of the account, the admission of the ledger was, in any event, harmless. The rule is that where error alleged by an appellant could have worked no injury to him, and could not have changed the result, the judgment appealed from will not be disturbed. See 2 Enc. Pl. & Pr. 500, and cases cited.

Judgment affirmed. All concur.

(101 N. W. 897)

STATE OF NORTH DAKOTA v. MARTIN MATTISON, ERIC MATTISON
AND LYE STORBY.

Opinion filed October 19, 1904.

Shooting With Intent to Kill.

1. Where the defendant in a criminal case is accused of shooting or attempting to shoot with intent to kill, or of shooting or attempting to shoot with intent to do bodily harm (Rev. Codes 1899, sections 7115, 7145), a verdict for assault with a deadly weapon with intent to do bodily harm will not warrant sentence for more than simple assault.

Information — Duplicity.

2. An information which purports to charge a single offense, but in stating the facts and circumstances alleged to constitute such crime unnecessarily alleges matters of aggravation, which sufficiently describe one or more other crimes not necessarily included in the one offense intended to be charged, is bad for duplicity.

Maiming.

3. Maiming is not an offense included in the crime of shooting with intent to kill.

Duplicity — Higher Offense Including Lower.

4. Where an information definitely purports to charge a given offense, but is duplicitous, and it clearly appears from the record that the defendants, notwithstanding their objection, were compelled to submit to a trial for the offense which the information purported to charge, on the erroneous theory that the other offense was one included in the crime which the information purported to allege, the objection for duplicity cannot be avoided, even though the information discloses a sufficient charge of a third offense, which might be construed to include the two former.

Appeal from District Court, Ward county; *Palda, Jr., J.*

Martin Mattison and others were convicted of shooting with intent to kill, and appeal.

Reversed.

Le Sueur & Bradford, for appellants.

James Johnson, State's Attorney.

engerud, J. The three defendants were arraigned on an information which was apparently designed to charge them jointly with the crime of shooting another with intent to kill, as defined in section 7115, Rev. Codes 1899. They demurred to the information, and

thereby challenged its sufficiency because it did not substantially conform to the requirements of the Code of Criminal Procedure, and charged more than one offense. The demurrer was overruled, and the defendants entered pleas of not guilty. The jury returned a verdict finding the three defendants "guilty of an assault with a dangerous weapon with intent to do bodily harm, without justifiable or excusable cause." A motion in arrest of judgment having been denied, the defendants were sentenced to imprisonment in the penitentiary for one year, eighteen months and three years respectively. The defendants have appealed from the judgment.

It is apparent from the foregoing that the sentences imposed are not warranted by the verdict for the reasons stated in the recent case of *State v. Cruikshank*, 13 N. D. 337, 100 N. W. 697. The verdict does not in terms find the act of shooting or attempting to shoot; neither does it set forth facts sufficient from which shooting or attempting to shoot must necessarily be inferred. If no other errors affecting the verdict appeared in the record, we would be constrained to allow the verdict to stand as one for simple assault, and remand the case for sentence in accordance with the verdict. The record, however, discloses error fatal to the validity of the verdict. We are of the opinion that the information is vulnerable to the objections made thereto by defendants, and that their demurrer thereto should have been sustained, or the motion in arrest of judgment granted. The information is too long for repetition in full. It is extremely prolix, and is replete with redundant and unnecessary averments. In our opinion, the information charges at least three offenses. The first part of the body of the information, after stating time and place, sets forth the complete offense of shooting under section 7115, Rev. Codes 1899, as follows: "That at the said time and place * * * the said Martin Mattison, Erik Mattison, and Lye Storby, having and holding in their hands a certain firearm, commonly called a shotgun, which shotgun was then and there loaded and charged with gunpowder and leaden shots, did then and there wilfully, unlawfully, feloniously, of their malice aforethought, without authority of law, and with a premeditated design to kill him, the said George Olson, discharge and shoot off said shotgun towards, against and upon the said George Olson." Then follows an averment to the effect that the shot so fired from said gun by the defendants struck, penetrated and dangerously wounded said George Olson, and caused the loss of one of his legs.

We have up to this point of the information facts which may be sufficient to charge an attempt to commit murder in the first degree. The allegations show that the defendants feloniously, with malice aforethought, and with a premeditated design to effect death, inflicted a dangerous wound upon their victim with a deadly weapon, but failed to consummate the intended murder because the wound was not mortal. Such attempt is punishable as a felony under sections 7693, 7694, Rev. Codes 1899. Further continuing the accusation, the information describes still another offense, which, after omitting many superfluous adjectives and redundant phrases, is set forth in the following language: "And at the time and place aforesaid, and by the means aforesaid, the said Martin Mattison, Erik Mattison and Lye Storby, wilfully, * * * and with a premeditated design to kill him, the said George Olson, * * * did wound and destroy the leg of the said George Olson." In plain English this part of the accusation alleges that the defendants unlawfully and wilfully destroyed George Olson's leg, with a premeditated design to kill him. This is a sufficient charge of maiming under section 7101, Rev. Codes 1899, which defines that crime as follows: "Every person who, with premeditated design to injure another, inflicts upon his person any injury which disfigures his personal appearance or disables any member or organ of his body or seriously diminishes his physical vigor, is guilty of maiming." It is true that the information alleges that the injury was inflicted with a premeditated design to kill while the statutory definition requires a premeditated design to injure only. But it is obvious that a design to kill includes a design to injure, and hence that, although the statute requires merely an intent to injure as an essential to guilt, it is no objection to the accusation that it alleges an intent of a more atrocious degree in the commission of the offense which is otherwise sufficiently charged. Barbour, Magistrates Criminal Law, 290, 291; State v. Robbins, 66 Me. 324; Com. v. Carson, 166 Pa. 179, 30 Atl. 985. While under the common law, an indictment for a felony might, under certain circumstances, allege in separate counts any number of distinct felonies, provided they were of the same general nature, or were connected with the same transaction, yet even under that system of criminal procedure no rule was better settled than that which prohibited the joinder of two or more substantive offenses in the same count. The rule was necessary in order that the accused might not be in doubt

as to the specific charge against which he was called to defend himself; that the court might know what sentence to pronounce; and that the accused might be fully protected against any other prosecution for the same offense. *State v. Burgess*, 40 Me. 592. This common-law rule has been perpetuated by the provisions of our statute, and has been further narrowed and restricted so as to exclude all those exceptions to the rule which were recognized by the common law in certain classes of crimes, such as burglary, etc. *State v. Smith*, 2 N. D. 515, 52 N. W. 320. The practice of combining in one indictment under separate counts several distinct crimes has been abolished, so that separate counts can be used only to set forth the commission of the same crime in different forms and degrees. Under the provisions of our Code of Criminal Procedure the same offense may be set forth under different counts, but only one offense can be charged. Rev. Codes 1899, section 8042. The indictment or information must state the acts constituting the offense "in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." Rev. Codes 1899, section 8039. It must be direct and certain as to "the offense charged." Rev. Codes 1899, section 8040.

The information in the case at bar was framed in flagrant disregard of the requirements above stated. It is not couched in ordinary and concise language. It might be difficult for a person of ordinary understanding to definitely determine what offense is charged; and it alleges facts constituting three distinct crimes. If this information directly and with certainty disclosed that it was intended to charge the crime of attempted murder, we are not prepared to say that it would be objectionable for duplicity. In that case it might be urged with much force that malice, premeditated design to kill, shooting and maiming, were all necessary facts to allege in order to show an attempt to murder, and hence that the information is not duplicitous. *Encyclopedia of Pleading and Practice*, vol. 10, p. 535. This information, however, does not present such a case. The information expressly purports to charge the crime denounced by section 7115, Rev. Codes 1899—shooting with intent to kill; but was evidently framed so as to include the crime of maiming, on the theory, apparently, that, inasmuch as the crime of maiming resulted from the commission of the shooting, therefore the former could be included in the charge of the latter

as an included constituent offense. There is no warrant for such a theory. Only one offense can be charged in the information. It is true that when the offense charged includes another or smaller offense the charge of such other offense will not render the information double. But the rule last mentioned applies only in a case where, in charging the major offense, the other offenses are necessarily stated. The state cannot, by alleging matters wholly immaterial to the description of the crime charged, compel the defendant to come to trial prepared to contest any issue which the state is not bound to prove in order to convict him of the offense charged. *State v. Smith*, 2 N. D. 515, 52 N. W. 320; *State v. Marcks*, 3 N. D. 532, 58 N. W. 25; *State v. Hooks*, 69 Wis. 182, 33 N. W. 57, 2 Am. St. Rep. 728. Maiming is not a necessary element of the crime of shooting with intent to kill. In stating the facts constituting the last-mentioned crime it is in no case necessary to show maiming. Maiming may, and often does, result from shooting, but it is a distinct offense, under no circumstances forming part of the consummated crime of shooting with intent to kill. In this case the maiming and shooting bear precisely the same relation to each other as the larceny and burglary involved in *State v. Smith*, *supra*, and, for the reasons stated in that case, cannot be joined in the same indictment or information.

Returning, then, to the question as to whether we may avoid the fault of duplicity by construing this information as one for attempted murder, and, by holding that it was necessary to allege the shooting and maiming in order to show the attempted murder, we are confronted by the fact that the information was not framed on that theory. As already stated, the information purports to charge the crime of shooting with intent to kill, and was obviously framed on the theory that maiming was an included offense. The record before us discloses that it was so construed by the prosecuting officer and by the court, and that the defendants were compelled to take issue and submit to a trial on that theory, notwithstanding their objection seasonably made. The information does not directly accuse the defendants of attempt to murder, and that charge is not disclosed with certainty by the language used. Under such circumstances we ought not to place a construction upon the information utterly at variance with the meaning manifestly intended to be conveyed in order to uphold an information so faulty as the one at bar. The defendants were entitled to a trial for one

offense only, and to be definitely and with certainty informed of the nature of the accusation. If we construe this information as an accusation of attempted murder, it would be lacking in the requisites of definiteness and certainty. By taking such a course we would place ourselves in the situation of the sailor who, in trying to avoid Scylla, wrecked his ship on Charybdis. The information should therefore be construed as the prosecuting officer and the trial court construed it. So construed, it is clearly duplicitous, and the demurrer thereto should have been sustained.

The judgment is reversed, and the trial court is directed to set aside the judgment and verdict, and quash the information, and to make such further order permitting another information to be filed, or such further proceedings to be had, as may be consistent with the demands of justice and the provisions of the law. All concur. (100 N. W. 1091.).

MARSHALL-WELLS HARDWARE COMPANY V. NEW ERA COAL COMPANY, WILLIAM VON STEINWEHR, EDWARD E. COLE, E. Y. SARLES, SETH G. WRIGHT, F. B. MILLS, O. P. CARTER, ROBERT S. LEWIS AND HARRY RICHARDS, DEFENDANTS AND RESPONDENTS, AND SECOND NATIONAL BANK OF MINOT, APPELLANT.

Opinion filed October 19, 1904.

Corporations — Stockholders' Liabilities Enforced Without Reducing Claim to Judgment.

1. A creditor whose claim has not been reduced to judgment may maintain an action against an insolvent corporation on behalf of himself and all other creditors to enforce stockholders' liabilities as defined by section 2902, Rev. Codes 1899. Sections 5767-5770 authorize such an action.

Enjoining Creditors' Action to Enforce Lien — Abuse of Discretion — Receiver.

2. Section 5773, Rev. Codes 1899, authorizes an injunction prohibiting creditors from proceeding with actions against an insolvent corporation where a creditor has brought an action under sections 5767-5770. But it is an abuse of discretion to issue an injunction under said section against a creditor who has brought an action to foreclose a lien in his favor, when it is shown that general creditors can in no event derive any benefit from the proceeds of the property covered by the liens; and it is also an abuse of discretion to grant an injunction against the foreclosure of a lien in such a case or to restrain a pending action by a creditor against such corporation owning property without first appointing a receiver to preserve such property.

Appeal from District Court, Cass county; *C. A. Pollock*, Judge.
Action by the Marshall-Wells Hardware Company against the New Era Coal Company and others. Judgment for plaintiff, and the Second National Bank of Minot appeals..

Reversed.

Le Sueur & Bradford, for appellant.

A court cannot restrain proceedings begun in pursuit of a statutory right. This would place the judicial above the legislative branch of the government. High on Injunctions, section 29; Brown's Appeal, 66 Pa. St. 155.

Section 4796, Rev. Codes, having provided a remedy against the property, it was error to enjoin the use of it.

Section 5046, Rev. Codes, 1899, subdivision 1, makes a single exception to the rule, that injunction must not issue against judicial proceedings pending when the injunction suit was begun. *Wilson v. Baker*, 2 Pac. 253; *Buell v. San Francisco Savings Union*, 4 Pac. 14; *Rickett v. Johnson*, 8 Cal. 34; *Uhlfelder v. Levy*, 9 Cal. 608; *Crowley v. Davis*, 37 Cal. 268.

The statute of California under which the above were rendered is like that of North Dakota, and it may be regarded as settled that, except to avoid multiplicity of actions, a court cannot restrain proceedings in a court of co-ordinate jurisdiction. Injunction can only issue against a party to the cause in which it is granted. *Foreman v. Healey*, 11 N. D. 563, 93 N. W. 866.

The test of the right to sequester the property of a corporation is, that the action therefor must be begun by a judgment creditor, whose execution is returned unsatisfied. *Minkler v. The United States Sheep Company*, 4 N. D. 507, 62 N. W. 594; 33 L. R. A. 546.

The plaintiff asks for a receiver. It would be an abuse of discretion to issue an injunction to restrain interference with property without at the same time appointing a receiver to preserve it. It was error to enjoin without a bond and appoint a receiver upon the showing made. A receiver takes the property subject to the rights of parties having liens thereon. High on Receivers, section 138; *Van Roun v. Superior Court of San Francisco*, 58 Cal. 358.

In New York, under statutes similar to ours, a creditor of a corporation before judgment is not entitled to a receiver in an action for its dissolution and sequestration of its effects, upon the

ground of insolvency, suffering other creditors to obtain a preference. *Galway v. U. S. Steam Sugar Refining Co.*, 13 Ab. Pr. 211; High on Receivers, section 301.

Statutory lien can be enforced only by the statutory mode, if one is provided, i. e. action, judgment and sale on execution. Equity cannot enjoin the prosecution of an action at law to enforce a lien of the same kind, because the holder of the latter is not made party in a suit to foreclose another lien. Nor does the equitable doctrine of equality among lien holders apply to such a case. *Hall v. Hinckley et al.*, 32 Wis. 362; High on Injunctions, section 336, 472.

Newman, Spalding & Stambaugh, for appellants.

The action is to enforce the liabilities accruing under sections 2877 and 2902, relating to personal liabilities of stockholders of a corporation. The action is statutory, and is warranted by sections 5767 and 5769, Rev. Codes 1899, and the injunction issued is governed solely by section 5773 of Rev. Codes. The action is equitable, providing fully for the sequestration of all the property of the insolvent corporation, and its application to the payment of all debts, and distribution to creditors, preserving liens and their priorities, without preference except such as are due to valid liens. Rev. Codes, 5571, 5572, etc.; *Arthur v. Willius*, 46 N. W. 851.

Without statute equity can restrain all proceedings by creditors other than those who bring the action. *Pfhol v. Simpson*, 74 N. Y. 137.

The statute extends the jurisdiction so that an action can be brought in the first instance against a corporation, its stockholders, directors and other officers. Section 5767, Rev. Codes 1899, and section 5773 authorizes an injunction against creditors without making them parties. Similar statutes are construed in *Johnson v. Rossie Galena Co.*, 9 Paige 599; *Rankine, receiver, v. Elliott*, 16 N. Y. 377.

In cases of this character a court of equity can restrain proceedings in another court of co-ordinate jurisdiction. *Erie Ry. Co. v. Ramsey*, 45 N. Y. 637; *Adler v. Milwaukee Brick Co.*, 13 Wis. 57.

Under such statutes action may be brought without reducing claims to judgment. *Cleveland v. Marine Bank of Milwaukee*, 17 Wis. 545; *Ballston Spa Bank v. Marine Bank of Milwaukee*, 18 Wis. 490; *Pierce et al. v. Milwaukee Construction Co.*, 38 Wis. 253.

Newman, Spalding & Stambaugh, on rehearing.

The statute of this state is not identical with that of New York on the same subject. Section 5773 authorizes an injunction to restrain all proceedings by any other creditor, etc. The decision of this court makes it read "all proceedings, except those to foreclose liens upon property of the defendant corporation, by *any* other creditor, except a creditor holding such a lien." The words "all" and "any" have a well defined meaning; they are entirely unambiguous, and need no interpretation, and no interpretation is admissible. *Harrington v. Smith*, 28 Wis. 43; *Terrance v. McDougal*, 12 Ga. 530; *Guest v. Updyke*, 31 N. Y. Law, 552; *Lake County v. Rollins*, 130 U. S. 662, 32 L. Ed. 1060, 9 Sup. Ct. Rep. 651.

If words have a definite meaning, involving no absurdity nor contradiction of any other part of the instrument, such meaning must be accepted. *Newell v. People*, 7 N. Y. 9; *Mills v. Chicago*, 60 Ill. 86; *Denn v. Reid*, 35 U. S. 524, 10 Pet. 524, 9 L. Ed. 519; *Leonard v. Wiseman*, 31 Md. 204; *People v. Potter*, 47 N. Y. 375; *Cooley Const. Law*, 57; *Story Const. section 400*; *Beardstown v. Virginia*, 76 Ill. 34; *United States v. Fisher*, 6 U. S. 358; 2 Cranch, 358, 2 L. Ed. 304; *Doggett v. Florida R. R. Co.* 99 U. S. 72, 25 L. Ed. 301.

MORGAN, J. This action is brought by the plaintiff on behalf of itself and all other creditors of the New Era Coal Company, a corporation organized under the laws of this state. The plaintiff furnished the New Era Coal Company goods and merchandise, for which payment has been refused. Other claims for merchandise by other persons against this corporation, duly assigned to the plaintiff, are also included in plaintiff's cause of action. The coal company is alleged to be insolvent, and its directors and stockholders are made defendants in this action, and judgment is asked against them for these creditors' claims, pursuant to the liability imposed upon them for all debts of the corporation to the extent of the amount of unpaid stock. The plaintiff is a general creditor only, and its debt has not been reduced to judgment. The Second National Bank of Minot was also a creditor of said New Era Coal Company, and had commenced two actions upon its claims against said corporation. One of these actions was founded on a debt secured by a miner's lien, and the action was brought to foreclose such lien. All other lienholders against the defendant's property were made parties to that action. The New Era Coal Company appeared in that action. The other action against the coal company was a

money demand action. Both of these actions were pending when this action was commenced. The relief prayed for in this action is that creditors be required to exhibit their claims and become parties to this action; that all proceedings by other creditors be restrained; that the amount due plaintiff and all other creditors be ascertained; that an account be taken of the property and debts due to and from said company, and if, upon such account, it shall appear that the defendant corporation is insolvent, that the court shall proceed and ascertain the liabilities of each of the defendant stockholders; that a receiver of the property of such corporation be appointed, and such property be converted into cash, and, if the proceeds of the property be insufficient to pay the debts of said corporation, that the stockholders be adjudged to pay the same; and that the court adjudge the amount payable by each of said defendants, Wm. Von Steinwehr, E. C. Cole, E. Y. Sarles, Seth G. Wright, F. B. Mills, O. P. Carter, R. S. Lewis and Harry Richards, and that the proceeds of the corporation's property be distributed among the creditors as provided by section 5779, Rev. Codes 1899.

Before issue was joined in this action, the plaintiff procured an injunction restraining the Second National Bank of Minot from proceeding with its actions. This injunction was procured on notice, and the said bank appeared at the hearing and resisted the granting of the injunction. The injunction was based on an affidavit reciting no facts as grounds for granting the injunction except the commencement of this action on behalf of itself and all other creditors. It recited as grounds for granting the injunction the commencement of this action, and the complaint was made a part of the affidavit. It further stated that, "if said Second National Bank of Minot is permitted to prosecute to a conclusion its said actions, this court will be unable to grant the full and complete relief prayed for in the above-entitled action." The district court granted the injunction, and this appeal is from the order granting the same.

Two questions present themselves for consideration under the facts set forth: (1) Whether a plaintiff in this class of actions can maintain the same, as a general creditor, before reducing his claim to a judgment and exhausting all his legal remedies; (2) whether section 5773, Rev. Codes 1899, authorizes an injunction in such actions without a showing therefor, as required in equitable proceedings generally. Respecting the first question we are agreed that such

action will lie by a general creditor on behalf of himself and all the other creditors before his claim is reduced to judgment. The cause of action is based upon section 2902, Rev. Codes 1899, which provides that "each stockholder of a corporation is individually and personally liable for the debts of the corporation to the extent of the amount that is unpaid upon the stock held by him," etc. This section makes the stockholders liable for the debts of the corporation to the amount of the stockholders' unpaid stock. The stockholders' liability is not conditional nor secondary under said section. It is primary liability, and accrues as soon as the debt is contracted. It may be enforced as a personal liability by the procedure laid down in sections 5767-5770, Rev. Codes 1899. The action to enforce the stockholders' liability under section 2902 is an equitable action, and involves the adjustment of all creditors' rights, and the liability of the stockholders to the creditors and among themselves as stockholders. The stockholders' liability under section 2902 is not subject to conditions nor secondary, but is an absolute liability to the extent of the unpaid stock subscriptions. Section 5767 reads as follows: "In an action against a corporation upon a claim for which its stockholders, directors, trustees or other officers, or any of them, are liable by law in any event or contingency, one or more or all of the persons so liable may be made parties defendant by the original or by an amended or supplemental complaint, and their liability may be declared and enforced by the judgment in such action." Section 5769 provides that "whenever any creditor of a corporation shall seek to charge the directors, trustees, or other officers or stockholders thereof on account of any liability created by law, he may commence and maintain an action for that purpose in the district court and may at his election join the corporation in such action." Said section 5770 provides: "The court shall proceed therein as in other cases, and when necessary shall cause an account to be taken of the property and debts due to and from such corporation and appoint one or more receivers who shall possess all the powers conferred and be subject to all the obligations imposed on receivers by the provisions of section 5765; but if, upon the filing of an answer or upon the taking of such account it shall appear that the corporation is insolvent and that it has not property or effects to satisfy such creditor, the court may without appointing any receiver, proceed to ascertain the respective liabilities of such directors, trustees or other officers and stockholders and enforce

the same by its judgment as in other cases." Under these sections the action is not strictly one to sequester the property of a corporation. As the complaint is framed, some of its allegations would indicate that the action is one brought for that purpose. But the action for sequestration alone is authorized by section 5761, Rev. Codes 1899, which provides that such action is to be brought by a judgment creditor. The sections under which this action is brought are practically like the sections of the Wisconsin Code construed in *Booth v. Dear et al.*, in 96 Wis. 516, 71 N. W. 816, and the following construction is given there: "It is quite clear that a proper construction of sections 3223 and 3224 [Rev. St. 1878] * * * does not require that the assets of the corporation shall be fully exhausted before the creditors may proceed to judgment against the stockholders. The legislative intent obviously was that the court should so administer the affairs of the corporation as to satisfy its liabilities out of its assets so far as practicable, and, upon the fact appearing that the stockholders' liability would be required in order to fully pay the corporation debts, to enforce such liability, and, if necessary, by judgment against such stockholders. It is therefore sufficient to warrant proceeding to judgment in an action of this kind that it be made to appear that the liability of the stockholder will have to be ultimately resorted to in order to fully pay the corporation debts. The facts in that regard do not go to the cause of action. Therefore it is not essential to the complaint that such facts be alleged therein. It is sufficient to allege and show that the plaintiff is a creditor of the corporation, having a debt due and payable; that he sues on behalf of himself and all other creditors of the corporation; that the defendants are stockholders liable for such indebtedness. * * * Prior judgment against the corporation in the action to enforce such liability is not necessary to exist or be pleaded, or want of assets of the corporation to meet its liabilities." See, also, *Williams v. Meloy*, 97 Wis. 561, 73 N. W. 40. Our conclusion is that the stockholders' liability is primary and absolute under our statutes; that its extent may be determined in an action under sections 5767 to 5770, *supra*; that their liability may be determined in such an action without the appointment of a receiver; and that the rights of such creditors as participated in such action by filing their claims, as well as the extent of the liability of stockholders, may be determined by the judgment in such action, and it may be done without the appoint-

ment of a receiver or with it, depending upon the facts of each case. These sections lay down a rule of procedure in actions by a creditor for himself and on behalf of other creditors, and such procedure is independent and different from the action contemplated by section 5761. Under section 5767 it is clear that the action named therein is not intended to be based upon a judgment. The action therein named is one "upon a claim." The word "claim," it is clear, cannot there be intended to be synonymous with the word "judgment." The sections, considered together, are clearly intended to contemplate a suit by a general creditor in behalf of himself and others whose claims have not been reduced to judgment. The action under these sections is different in its scope from the action authorized by section 5761, Rev. Codes 1899. In the latter action stockholders are not parties. The relief sought pertains only to the corporation as such, and no relief is obtainable against the stockholders. *Clark v. Banner*, 50 Wis. 416, 7 N. W. 309.

Before issue was joined an injunction was granted by the district judge pursuant to section 5773, Rev. Codes 1899, which reads as follows: "Whenever any action shall be commenced against any corporation, its directors, trustees or other officers, or its stockholders according to the provisions of this article, the court may, by injunction on the application of either party and at any stage of the proceedings, restrain all proceedings by any other creditor against the defendant in said action, and whenever it shall appear necessary or proper may order notice to be published * * * requiring all the creditors of the corporation to exhibit their claims and become parties to the action, * * * and in default thereof such creditors shall be precluded from all benefit of the judgment which shall be made in such action and from any distribution which shall be made under such judgment." It is contended that it is an abuse of discretion to grant the injunction under the facts as they existed when it was granted. The Second National Bank of Minot had commenced an action to foreclose its lien against the real property of the New Era Coal Company. It made all other lienholders parties to its suit, under section 4810, Rev. Codes 1899. It is contended that the mere institution of a suit by one creditor for the benefit of all creditors against an insolvent corporation is alone sufficient to warrant the court in issuing an injunction against the prosecution of other pending actions. The object to be gained by such injunction is to consolidate the claims of all creditors into one suit for the benefit of

all. This is done to avoid unnecessary costs, and to avoid the securing of undue advantage by one creditor over another, and to avoid the sacrifice of the corporation's property by unnecessary suits or proceedings. It might be issued as a matter of course to restrain money demand actions. In short, the action invests the court with discretion as to when this injunction will be issued. In determining when the injunctive order shall issue, the same principles, or at least analogous principles, will govern as in the granting or refusing of an injunction under the regular equitable procedure. Whether the suit to be restrained is one for money only or for foreclosing securities, whether a receiver has or will be appointed, and whether the general creditors of the corporation will be benefited by an injunction against other suits, are proper facts to be considered in determining whether such injunction shall issue or not. The action is an equitable action (Cook on Stockholders, section 204), and the question when this injunction shall issue is to be determined upon the facts, with a view to a proper equitable adjustment of all the creditors' rights as well as those of the stockholders. Said section 5773 is not mandatory, but permissive, in its terms. Under it creditors may be required to exhibit their claims and to become parties to the creditors' action. But it is not compulsory that they exhibit or file their claims. It is optional with them whether they shall exhibit their claims or not. If they refuse to exhibit or file their claims, and thus become parties to the creditors' action, they are denied any benefit in the distribution to be made by the judgment, and suffer no other penalty by not joining in the creditors' suit. If lienholders become parties to the creditors' suit, their liens are protected in the creditors' suit, and are paid in preference to unsecured creditors by the positive requirements of section 5779, Rev. Codes 1899. But whether they shall be required to exhibit their claims in the creditors' suit is also discretionary with the court. This discretion is controlled or moved by the facts as they appear on the application for the injunction under section 5773. In this case the records show that the property involved in the creditors' suit was valued at \$4,000, and the liens covering it, which were also involved in that suit, amounted to about \$7,000. It is therefore obvious that general creditors could gain nothing by attempting to have the property covered by this lien distributed in the creditors' suit, as the proceeds must be distributed to the lienholders to the amount of their liens before payment of the creditors in general.

If these lienholders chose to not join in the creditors' suit, they should be allowed to enforce their liens by their own suit, and, under the circumstances, it was an abuse of discretion to compel them to join in the creditors' suit. In this case no receiver has been appointed. To enjoin a suit by a secured creditor for the enforcement of his lien is an abuse of discretion unless a receiver has been appointed to preserve the property; and this is true of a mere money demand action, where the corporation has property out of which payment may be exacted by the creditor through such suit. The secured creditor and the general creditor also are each entitled to the property of the corporation preserved intact by a receiver for the satisfaction of their claims. In case a receiver has been appointed, a different question would arise, so far as discretion in granting an injunction is concerned. In a case where the general creditors would have an equity in the corporation's property after the liens were satisfied, a different conclusion might follow, and such an injunction be properly granted, in case a receiver had been appointed. All such matters are for decision by the court on the application for the injunction. We hold that section 5773 vests a discretion in the court in granting or refusing the injunction. A showing of strictly equitable grounds for an injunction is not necessarily to be made, nor an undertaking necessarily required, in every case. In the present case the district court abused the discretion vested in it by granting the injunction when no benefit could follow to the general creditors, and also because no receiver had been appointed to protect the property, and to keep it for the benefit of the secured creditors first, and then for the equal benefit of all unsecured creditors. Section 5773 must be construed in reference to the objects intended to be gained by its enactment, in connection with the other section quoted—that of distributing the corporation's property according to the rights of all the parties concerned. To construe it as arbitrarily authorizing an injunction whenever such an action as this is commenced would render it in this and many other cases an instrument of injustice. The construction given to it by us does its language no violence, and is in accordance with its spirit and purpose.

So far as the trial court restrained the suit to foreclose the lien its action was erroneous, and must be reversed. As to the injunction against the suit for a money judgment, it is affirmed, it not appearing that the corporation has any property except that covered

by the liens embraced in the foreclosure suit. The appellant will recover its costs and disbursements in both courts. All concur.

(100 N. W. 1084.)

THE STATE OF NORTH DAKOTA, EX REL. CHARLES J. FISK, TRACY
R. BANGS AND GUY C. H. CORLISS, v. E. F. PORTER, SECRETARY
OF STATE.

Opinion filed October 24, 1904.

Elections — Official Ballot — Regulations.

1. Section 491, Rev. Codes 1899, which prohibits the printing of the name of a candidate for office in more than one column of the official ballot, is, as to a candidate who is the nominee of a single political party and the nominee of electors by petition, a reasonable regulation of the manner of exercising the right of suffrage, and is valid and constitutional.

Application by the state, on the relation of Charles J. Fisk, for writ of mandamus to E. F. Porter, Secretary of State.

Writ denied.

Charles F. Templeton, Guy C. H. Corliss and Tracy R. Bangs,
for plaintiff.

The statute forbidding the printing of the name of a candidate for office in more than one column, and, in case of the nomination of the same person by more than one party, forcing him to choose on which ticket his name shall be printed, and directing that, on failure to make such choice, it shall be printed on the ticket first filed, is an unconstitutional interference with the rights of political parties. *Murphy v. Curry*, 59 L. R. A. 97.

C. N. Frich, Attorney General, *John Philbrick*, Assistant Attorney General, *Newman, Spalding & Stambaugh*, and *R. H. Bosard*, for defendant.

One claiming a statute to be unconstitutional must point to the specific provision of the constitution, either expressed or clearly implied from what is expressed, which the act violates. The court will never declare a statute invalid unless its invalidity is placed beyond a reasonable doubt. *Bon Homme County v. Berndt*, 15 S. D. 494, 90 N. W. 147.

The exercise of the right of suffrage is provided for by the constitution, and the persons to whom such right is limited have a

right to exercise it, which cannot be defeated by the legislature. Cons. N. D., article 5. That instrument nowhere provides for the rights of candidates for office or political parties. Such provision is left to the discretion of the legislature. "All elections by the people shall be by secret ballot, subject to such regulations as shall be provided by law." Const. N. D., section 129. There is no limitation to the exercise of this power so long as it does not prevent the elector voting for the candidate of his choice.

In the case at bar, the elector's name is placed on the ballot and may be marked by any voter. He may also place on the ballot the name of any person that he wishes to vote for. Rev. Codes 1899, section 516.

The question involved is one of legislative power alone, and the reasonableness, expediency and convenience of the requirements is solely a matter of legislative discretion, not reviewable by the courts. *State v. Anderson*, 76 N. W. 482, 42 L. R. A. 239; *State v. Bode*, 45 N. E. 195, 34 L. R. A. 498, 69 Am. St. Rep. 696; *Todd v. Board of Election Com'rs*, 62 N. W. 564, 64 N. W. 496, 29 L. R. A. 330.

The provision is constitutional and the writ should be denied.

YOUNG, C. J. Upon the application of the Honorable C. J. Fisk an alternative writ of mandamus issued out of this court directed to the secretary of state, and commanding him to certify relator's name to the county auditors of Grand Forks and Nelson counties as a candidate by petition for the office of judge of the district court of the First judicial district, or show cause why he has not done so. It appears from the relator's affidavit upon which the alternative writ was issued, and from the return of the secretary of state, and there is no controversy as to these facts, that the relator was regularly nominated as the Democratic candidate for said office, and on September 23, 1904, a certificate of such nomination, in due form, was filed in the office of the secretary of state; that thereafter, and on the 5th day of October, 1904, a certificate of nomination of said C. J. Fisk by petition of electors for the same office was filed in the secretary's office; that upon receipt of the latter certificate of nomination the secretary of state requested the relator to designate the column on the official ballot in which he wished his name printed, and on the same day the said C. J. Fisk, in answer to said request, demanded that his name be placed twice on the official ballot, once in the column headed "Democratic," and once in a column to

be headed "A Non-Partisan Judiciary," that because of the relator's refusal to designate a column the secretary of state certified his name as the nominee of the Democratic party, and directed his name to be placed in the column headed "Democratic" upon the official ballot and in no other, and for the reason that the Democratic nominating certificate was first filed in his office.

Under the statutes of this state the name of a candidate for office secures a place and is printed upon the official ballot when such candidate is nominated by an "assembly or convention of delegates held for the purpose of making nominations," in accordance with the provisions of section 498, Rev. Codes 1899, or when he is nominated by a petition of electors pursuant to the provisions contained in section 501, Rev. Codes 1899. Our statute (section 491), in addition to prescribing the form and contents of the official ballot, provides for separate party columns, "under the appropriate party designation for each," in which the names of the party nominees are to be placed; also provides for one or more columns for the names of persons nominated by petition of electors under the designation "Individual Nominations." It also provides that "when the same candidate has been nominated for the same office by more than one assembly, convention or body of electors qualified to make nominations for public officers, such candidate shall file with the proper officer * * * a statement in writing, signed by himself, designating one of the columns upon such ballot allotted to one of the parties, assemblies, conventions or bodies of electors by whom said candidate has been nominated, as to the column upon such ballot in which such candidate desires his name to appear upon such ballot, and such candidate's name shall be printed upon such ballot in such column, and in no other. But if such candidate shall refuse or neglect to give notice to the proper officer as above provided, specifying in which column he wishes his name printed on the ballot, then in such case the said officer shall cause his name to be printed in the column of the party or political organization from which he received first notice of such person's nomination."

It thus appears that the refusal of the secretary of state to certify the nomination last filed, i. e., the nomination by petition of electors, was made in obedience to the legislative command contained in section 491, *supra*, prohibiting the printing of a candidate's name upon the official ballot in more than one column, and it is argued that nominations by petition of electors, such as that here

in question, is within the prohibition of this section. Counsel for relator contend that the portion of the statute which prohibits the printing of a candidate's name in more than one column is unconstitutional and void, and that it is not within the power of the legislature to deny to him the right which he asserts, i. e., to have his name printed in his party column as a party candidate by virtue of his party nomination, and also in a separate column by virtue of his nomination by petition of electors. This particular provision is not peculiar to this state, and the question of its constitutionality is not a new one to the courts. It is contained in the Australian ballot laws of Wisconsin, Ohio and Michigan, and in each of these states it has been held constitutional. *State v. Anderson*, 100 Wis. 523, 76 N. W. 482, 42 L. R. A. 239; *State v. Bode*, 55 Ohio St. 224, 45 N. E. 195, 34 L. R. A. 498, 60 Am. St. Rep. 696; *Todd v. Board*, 104 Mich. 474, 62 N. W. 564, 64 N. W. 496, 29 L. R. A. 330. California has a provision somewhat similar. In that state it was held unconstitutional by a divided court. *Murphy v. Curry*, 137 Cal. 479, 70 Pac. 461, 59 L. R. A. 97.

These cases which are cited by counsel in support of their respective contentions will be found upon inspection to have involved questions which are not in this case. In each of the cases referred to the same candidate was the nominee of two or more political parties or organizations, and the question in each case was whether the legislature could restrict the printing of the candidate's name to one party column. The solution of that question involved a consideration of the rights of a nominee of two or more parties, the rights of political parties, and of electors as members of political parties. It will be seen that the weight of judicial opinion sustains the right of the legislature to restrict the printing of a candidate's name in such cases to one column. But we are not called upon to express an opinion on that question in this case. We have no such condition, and it will be time enough to answer that question when it is presented. The relator is the nominee of the Democratic party, and of no other party, and the secretary of state has certified his name to the county auditor as the Democratic nominee.

The only question which can arise in this case relates to the right of the relator or of the electors who signed the petition for his individual nomination to have his name printed in a separate column under the designation "Individual Nominations" as well as in his party column. The legislature has declared that it shall be printed

in but one column. Does this deprive the relator or the electors of any constitutional right? We think not. Counsel have failed to point out any provision of the constitution which is violated, and we know of none. If the relator was the nominee of two or more political parties, and was seeking a place on each party ticket, different questions would arise, such as were considered in the cases above referred to. But here the relator is the candidate of but one party or organization, and, under the statute and the facts as they exist, his name will appear in his party column. Hence no party interests or party question is involved. The electors who have nominated him by petition represent no party or organization. They merely represent themselves as electors. *Atkeson v. Lay*, 115 Mo. 538, 22 S. W. 481. They desire to have his name printed upon the ballot, so that they can vote for him without the annoyance of having to write or print his name upon the ballot. The state has afforded to electors this privilege, where a certain percentage or number of them join in a nominating petition, but at the same time has declared that it will print them in but one column, giving to the candidate the choice of columns in which his name shall appear. All authorities recognize the right of the legislature to regulate the manner of exercising the right of suffrage. The only restriction is that under the guise of regulating it shall not destroy the right. There is no ground whatever for contending that the electors' rights are either destroyed or impaired by the refusal to print the candidate's name in more than one column in a case like this, where the candidate has one party nomination and an individual nomination. It is altogether reasonable, under such circumstances, that the state should not be compelled to print a candidate's name in more than one column. The electors who join in making an individual nomination desire to vote for the man without regard to his party affiliations. If his name was printed under the head of individual nominations as well as in the party column, in order to vote for him they would have to designate their choice by a mark, and they are required to do nothing more where, as in this case, their candidate's name is printed in a party column. For those who desire to vote the straight Democratic ticket a single mark at the head of the ticket is sufficient. For those affiliated with other parties, or those who wish to vote a mixed ticket, a mark in the square opposite his name is sufficient, and this would be necessary even if his name appeared in a column under the head "Individual Nominations." Considered

then entirely from the standpoint of convenience, no burden is added in this case by restricting the candidate's name to his party column. (1)

The writ prayed for will be denied.

INGERUD, J., concurs. MORGAN, J., not participating.
(100 N. W. 1080.)

THOMAS HALLORAN V. C. DUANE HOLMES, DEFENDANT AND APPELLANT, AND E. K. WHITE, DEFENDANT.

Opinion filed October 25, 1904.

Adverse Claim — Proof of Passive Trust Upon Allegation of Absolute Title Not Fatal Variance.

1. In an action brought to establish plaintiff's ownership of land, and to prevent a conveyance thereof by a defendant apparently clothed with an absolute title, which the complaint alleges the defendant holds as security only for a debt, proof that the defendant's apparent title is a mere passive trust is not such a variance as to constitute a failure of proof.

Objection to Evidence on Ground of Variance Must Also Show Objector Misled to His Prejudice.

2. An objection to the admission of evidence on the ground that it is a material variance from the pleadings is of no avail unless the objection is supported by proof that the variance has misled the objecting party, to his prejudice, in maintaining his cause of action or defense on the merits.

Bona Fide Purchaser — Passive Trustee.

3. The land in dispute was wrongfully conveyed by the apparent but not real owner to H., who was only a nominal grantee to hold the title as trustee for a third party, who was the real buyer, and who paid the entire cash portion of the purchase price, and agreed to pay the remainder. *Held* that, as against the rightful owner of the land, H. was not a bona fide purchaser, but was a mere passive trustee for the real purchaser, even though H. signed a note and mortgage on the land to the seller for the unpaid portion of the purchase price.

Bona Fide Purchaser — Payment After Notice of Defect in Title.

4. Where one person is the cashier of a bank and secretary of another corporation, and is the active manager of both, a deposit by him in the bank of the consideration for a conveyance of land to the corporation of which he is secretary is not equivalent to payment to the grantor, so as to protect the grantee, as a bona fide purchaser,

when such deposit is retained in the bank under the direction of such person, and subject to his actual control, and is voluntarily paid over to the grantor after notice of the invalidity of the grantor's title.

One Who Receives Conveyance Before Notice of Defect But Pays Purchase Price Thereafter, Not a Bona Fide Purchaser.

5. One who pays to the grantor the entire consideration for a conveyance after notice of the grantor's invalid title is not a bona fide purchaser, even though he received the conveyance before such notice.

Appellate Court Notices Only Errors Affecting Appellant.

6. On appeal by one of several defendants, this court will not notice alleged errors which do not affect the appellant.

Appeal from District Court, Dickey county; *Lauder, J.*

Action by Thomas Halloran against C. Duane Holmes and others. Judgment for plaintiff. Defendant Holmes appeals.

Affirmed.

Benjamin Porter and *W. F. Mason*, for appellant.

When a grant of real property purports to be an absolute conveyance, but is intended to be a mortgage, it cannot be defeated as a grant against any person taking by purchase from the grantee therein named, without actual notice. *Mabury v. Ruiz*, 58 Cal. 11.

One who takes by a warranty deed is a purchaser in good faith for a valuable consideration within the meaning of the registry law, and entitled to protection, although his grantor took by a quitclaim deed. *Winkler v. Miller*, 6 N. W. 698; *Hannan v. Seidentopf*, 86 N. W. 44; *Chapman v. Sims*, 53 Miss. 154; *Kesler v. Johnson*, 81 N. W. 922; *Esty v. Cummings*, 83 N. W. 420.

E. E. Cassels and *C. W. Davis*, for respondent.

No variance between the allegation in a pleading and the proof shall be deemed material, unless it has misled the adverse party to his prejudice, and whenever a party is alleged to have been so misled, the fact shall be proved to the satisfaction of the court, and in what respect a party is so misled. Section 5293, Rev. Codes; *North Star Boot & Shoe Co. v. Stebbins*, 54 N. W. 593.

Variance between evidential facts alleged and those proved, which has not misled, surprised or prevented a fair trial is not fatal to a decree, warranted by the ultimate facts alleged in the bill. *Burt v. C. Gotzian & Co.*, 102 Fed. 937, 43 C. C. A. 59.

Burden of proof is upon defendant Holmes to show that he was a bona fide purchaser for value in good faith without notice. *Pricket v. Muck*, 42 N. W. 256; *Nolon v. Grant*, 5 N. W. 513; *Upton v. Betts*, 59 Neb. 730, 82 N. W. 19. Notice must be denied down to the payment of the purchase price. 23 Am. & Eng. Enc. of Law, 220, and cases cited.

Actual payment before notice must be shown clearly and positively before defense of bona fide purchaser can prevail. *Minor v. Willoughby*, 3 Minn. (Gil. 154) 225; *Newton v. Newton*, 48 N. W. 450; *Nickerson v. Meacham*, 14 Fed. 884; *Larkin v. Mining Co.*, 25 Fed. 342; *Davis v. Ward*, 41 Pac. 1011; *Wormley v. Wormley*, 8 Wheaton 421, 5 L. Ed. 651; *Woods v. Holley Mfg. Co.*, 46 Am. St. Rep. 64, 13 So. 953; *Boone v. Chiles*, 10 Peters 177, 9 L. Ed. 388; 23 Am. & Eng. Enc. Law, 517; *Doran v. Dazey*, 64 N. W. 1025; *Jewett v. Palmer*, 7 Johns Ch. 68, 11 Am. Dec. 401; *Ledbetter v. Walker*, 31 Ala. 177.

A witness not connected with a county office cannot testify to the absence of official papers belonging therein. *Fisher v. Betts*, 12 N. D. 197, 96 N. W. 132.

INGERUD, J. The plaintiff, Halloran, commenced this action March 22, 1902, against C. Duane Holmes and E. K. White. The complaint alleges, in substance, that on May 30, 1899, the plaintiff was the owner in fee of the section of land in controversy, situated in Dickey county; that plaintiff executed and delivered to said White a deed of the land in question, which deed, although absolute in form, was in fact given only as security for a present loan and certain anticipated future advances by White to plaintiff; that plaintiff has offered, and is ready and willing, to pay to White whatever sum may be due on account of such loan and advances; that White refuses to render any account, but insists upon retaining possession of and selling said land; that the defendant Holmes claims some interest or estate in said land adverse to plaintiff. The prayer for judgment is that an accounting be had between plaintiff and White; that, upon payment of the debt to White, the latter be required to convey to plaintiff; that Holmes be required to disclose the nature and source of his adverse claims; that the title be quieted in plaintiff; and for general equitable relief. White answered, admitting plaintiff's ownership of the land on May 30, 1899, and the conveyance thereof to himself by a deed absolute in form, but alleging that the consideration for the conveyance "was

in part said former indebtedness by the plaintiff to this defendant, and * * * that at the time of the execution of said deed of conveyance, and as part of the same transaction, it was agreed by and between the plaintiff and this defendant that this defendant should sell and convey said land, and should account to the plaintiff for the amount realized in excess of the consideration already received by the plaintiff for said conveyance, and interest thereon." He further alleges that pursuant to the said agreement he sold and conveyed the land to defendant C. Duane Holmes for \$3,400, which was a reasonable price; that plaintiff knew that such sale was about to be made, and acquiesced therein; that the defendant is, and always has been, ready and willing to account to plaintiff for the proceeds of said sale, and to pay to plaintiff whatever sum is due to plaintiff therefrom after deducting plaintiff's debt to defendant. The answer of defendant Holmes admits the plaintiff's ownership of the land on May 30, 1899; the conveyance thereof on that day by plaintiff to White; that he (Holmes) claims title thereto; and denies all other allegations of the complaint. The answer further alleges that this defendant, in good faith, for a valuable consideration, and without notice of any defect in White's title, purchased the land from, and had the same duly conveyed to himself by, E. K. White, in whom the title appeared of record by virtue of plaintiff's deed to the latter dated May 30, 1899, and which was recorded on February 28, 1902. The issues were submitted to the district court for trial without a jury. The trial court found, among others, the following facts: That plaintiff, who was then the owner of the land in dispute, on May 30, 1899, executed and delivered to defendant White a quitclaim deed thereof, absolute in form; that the deed recited a consideration of \$1,000, "but in fact no consideration whatever was paid therefor, and said conveyance was made in trust for the use and benefit of the plaintiff and his wife, Alice Halloran, and, in connection with the execution and delivery of said conveyance, the defendant White, joined by his wife, Anna A. White, executed and delivered to the plaintiff a trust agreement wherein and whereby he acknowledged said trust, and covenanted and agreed with the plaintiff and his wife, Alice Halloran, to convey said land and premises at any time, upon their joint demand, or upon the demand of either of them, by quitclaim deed, according to the terms of such demand, and without consideration therefor; that the defendant White then had not, nor

has he since then acquired, any other or further interest or estate in, or lien, incumbrance, or demand whatever upon, said land and premises, or any part thereof;" that White, without knowledge or consent of plaintiff, conveyed the land to Holmes for the agreed price of \$3,400; that the deed was delivered before the commencement of this action, but no part of the purchase price was paid until after the service of the summons and complaint upon Holmes; that \$1,700 of the purchase price was cash, and the remainder was represented by Holmes' promissory note to White for \$1,700, payable one year from its date, secured by mortgage on the land; that Holmes was a mere nominal grantee; that "the Marshall-McCartney Company, a corporation, of Oakes, North Dakota, however, negotiated for this conveyance from White to Holmes, paid the \$1,700 cash portion of the consideration therefor, expect to pay said note and mortgage when it becomes due or is paid, and Holmes has no interest in the premises, other than to hold the title thereto for said Marshall-McCartney Company;" that, when said corporation parted with the consideration for said conveyance, it had knowledge of the pendency of this action. As conclusions of law, the trial court held, in substance, that plaintiff was the owner in fee of the land; that White never had any title to or lien thereon; that neither Holmes nor the Marshall-McCartney Company were purchasers in good faith, without notice, and neither acquired any title by the deed from White. The conclusions further declare that the Marshall-McCartney Company was the real purchaser of the land, under the conveyance thereof by White to Holmes, and as such is a real party in interest, and a proper party defendant in this action. It was accordingly ordered that the Marshall-McCartney Company be made a party defendant; that judgment be entered annulling the deed from plaintiff to White and the deed from White to Holmes, barring the defendants, including the Marshall-McCartney Company, from any claim of title to, estate in, or lien upon the land, and awarding the title and possession thereof to the plaintiff. Judgment was entered pursuant to the order, and defendant Holmes alone appeals. A statement of the case embodying all the evidence was duly settled, and appellant demands a review of all the issues, under section 5630, Rev. Codes 1899.

Appellant contends that the finding of fact to the effect that the deed from plaintiff to White created a mere passive or dry trust in White with respect to the land is fatally variant from the

complaint, in which it was alleged that said deed was a mortgage. Defendants at the trial objected, on the ground of variance, to the introduction of all the evidence, upon which this finding is based. The proof on this subject, all of which came in subject to defendant's objection for variance, establishes conclusively the facts as stated in the finding. At the time the deed was executed a written declaration of trust was also executed, signed by White and his wife, the terms of which declaration were substantially as stated in the finding. The execution of this trust agreement was not disputed. No subsequent modification of it is claimed. Some evidence was offered by defendants, which was disputed by plaintiff, tending to show an oral agreement, contemporaneous with the execution of the written declaration of trust, to the effect that the deed was intended as security for an existing loan and future advances by White to Halloran. The evidence, however, was clearly incompetent, because it tended to vary the terms of the written agreement between the same parties with respect to the same subject-matter, and there was no claim of fraud or mistake with respect to the writing, or any ambiguity in its terms. We are further satisfied from the evidence in the case that the then existing indebtedness of plaintiff to White, and that which subsequently arose, was secured only by a mortgage of plaintiff's LaMoure county lands, and that the declaration of trust stated the true arrangement between the parties touching the land in question.

Under the provisions of the Code of Civil Procedure, a variance, unless it amounts to a failure of proof, is not material, unless "it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." If the objecting party asserts that such is its effect, "the fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as shall be just." Rev. Codes 1899, section 5293. "When the variance is not material as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs." Rev. Codes 1899, section 5294. The effect of these provisions is to make the materiality of a variance depend upon satisfactory proof that it has actually misled the adverse party to his prejudice. Unless such proof is furnished, the variance must be deemed immaterial and be disregarded. *Washburn v. Winslow*, 16 Minn. 33 (Gil. 19);

Catlin v. Gunter, 11 N. Y. 368, 62 Am. Dec. 113; North Star Boot & Shoe Co. v. Stebbins, 3 S. D. 540, 54 N. W. 593. In this case, although the defendants objected to the evidence in question on the ground of variance, they did not support their objection by proof, or offer of proof, that they were prejudicially misled by the variance in maintaining their defense on the merits. In the absence of such proof, an objection for variance is unavailing, unless the variance is of such a degree as to be a failure of proof, as defined in section 5295, Rev. Codes 1899. Under that section a failure of proof results only "When * * * the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning." This is not such a case. It is true, the complaint alleges, in effect, that the deed to White was a mortgage, and demands, among other things, an accounting, to the end that plaintiff may redeem. In that respect the action is in the nature of a suit to redeem. But that is not the entire cause of action, or all the relief sought. The complaint further alleges, in effect, that the plaintiff is the real owner in fee of the land; that White, although the apparent owner, is not such in fact, and is without right to convey; that he threatens to sell; and the ultimate relief sought is to protect and quiet plaintiff's title. Plaintiff's right, upon which he bases his cause of action, is his ownership in fee. The fact that he concedes in the complaint that White had a lien for an unascertained amount does not affect the nature of plaintiff's right to the land, or of the wrong the defendants have done him. Neither does it change the kind of ultimate relief demanded—the protection and enforcement of plaintiff's rights as owner in fee. In short, the variance here presented is not a departure from the "entire scope and meaning" of the alleged cause of action, but is a mere failure to prove it in some particulars. Catlin v. Gunter, 11 N. Y. 368, 62 Am. Dec. 113; Place v. Minster, 65 N. Y. 89; Anderson v. Bank, 5 N. D. 80, 64 N. W. 114; Burt v. Gotzian & Co., 102 Fed. 937, 43 C. C. A. 59.

Appellant asserts that the trial court's finding to the effect that Holmes was a mere nominal grantee, and held the title for the exclusive use and benefit of Marshall-McCartney Company, is not supported by the evidence. The evidence shows that the deed from White to Holmes had been by the former transmitted to the Bank of Oakes for delivery to Holmes on payment of the purchase price.

Half of the price was to be paid in cash, and the remainder by Holmes' note to White, secured by mortgage on the land. One McCartney was the cashier and active manager of the bank, and he was also the secretary and active manager of the Marshall-McCartney Company. The offices of the two corporations were in adjoining rooms of the same building, and the business of both was conducted by McCartney with the assistance of two clerks, one of whom was the defendant Holmes. The latter took no part in the negotiation for or consummation of the purchase from White, except to consent to the insertion of his name as grantee in the deed, and to affix his name to the note and mortgage, all of which he did at the request of McCartney. It was understood that Marshall-McCartney Company would pay the note, and that the title was held by him for the corporation as a matter of convenience. McCartney, as secretary of the Marshall-McCartney Company, deposited Holmes' note and mortgage, together with a draft bought with the corporation's money for \$1,700, in the Bank of Oakes, of which he was cashier. The draft and note were to be transmitted to White as soon as an alleged defect in the record title of the land was removed. The defect was removed March 22, 1902, which was the day the summons and complaint in this action were served on Holmes. Meanwhile McCartney had been called away from town, and Holmes and his fellow employe did not transmit the money, note and mortgage to White, but held the same until McCartney's return: When McCartney returned, about ten days after the action was commenced, he was informed thereof, and at once sought legal advice and retained attorneys to defend this action. He thereupon remitted the draft, note and mortgage to White.

On this state of facts, it is argued that the execution and delivery of the note by Holmes to the bank made him the real purchaser of the land, even though the Marshall-McCartney Company made the cash payment and expected to pay the note. It is further argued that the depositing of the money, note and mortgage in the bank for transmission to White placed them beyond the purchaser's control, and hence was equivalent to the payment of the entire consideration before suit commenced. We cannot agree to either of these propositions. Under the circumstances of this case, it is apparent that the execution of the note by Holmes was merely for the accommodation of the Marshall-McCartney Company. It is very clear that the Marshall-McCartney Company was the real

purchaser of the land, and, as such, expected to pay the note, and that Holmes was a mere passive trustee of the title. But even if Holmes is regarded as the real purchaser, his position is no better. In that case McCartney must be regarded as his agent, and it is undisputed that everything McCartney did was done with the express or tacit acquiescence of Holmes, and the latter is chargeable with the former's acts. Notwithstanding the formal delivery of draft, note and mortgage to the bank by McCartney, those papers remained under his actual control. He was the manager of both corporations. In the face of these facts, it is idle to attempt to distinguish by subtle refinements between his acts as cashier of the bank and his acts as secretary of the other corporation. The stubborn fact remains that the purchase price of this land did not and could not pass from his control until he voluntarily chose to part with it. It follows from the foregoing that appellant is not entitled to protection as a bona fide purchaser. It is essential to that defense not only that the defendant bought in good faith, but that the consideration was actually paid in good faith, without notice of the hidden defect in the title. *Fluegel v. Henschel*, 7 N. D. 276, 74 N. W. 996, 66 Am. St. Rep. 642; *Minor v. Willoughby*, 3 Minn. 225 (Gil. 154); *Jewett v. Palmer*, 7 Johns. Ch. 65, 11 Am. Dec. 401; *Pomeroy*, Eq. Jur., section 691. In this case none of the consideration was paid until long after the purchaser had notice of his grantor's alleged want of title, notice of which was conveyed to him in explicit terms by the complaint in this action.

Appellant finally assigns error upon that part of the order and judgment which purports to make the Marshall-McCartney Company a party defendant in this action. It is unnecessary for us to determine the propriety or effect of that order on this appeal. It does not affect the rights of this appellant in the slightest degree.

The judgment is affirmed. All concur.

ON REHEARING.

(November 23, 1904.)

The appellant has filed a petition for rehearing. It presents no propositions which were not fully considered by us in rendering our decision. The petition criticises, among other things, that part of the opinion in which it was said that a deed, absolute in form, but in fact a mortgage, does not convey the legal title to the grantee.

We did not discuss this proposition at length or cite authorities in its support, because the proposition, to our minds, was so obvious as not to require an extended discussion. Petitioner, however, cites *Hughes v. Davis*, 40 Cal. 117, and *Espinosa v. Gregory*, 40 Cal. 58, in which it is held that, where an absolute conveyance is given as security, the mortgagor retains the right of redemption only, the legal title being in the mortgagee; and counsel asserts that there is no conflict of authorities upon the rule laid down in these cases. Counsel has evidently overlooked the fact that these cases were decided before the adoption of the Civil Code in California. The Code of that state expressly provides, as does the Code of this state, that a mortgage is a mere lien, and that a deed absolute in form may be shown to be a mortgage. The Supreme Court of California, in *Taylor v. McLain*, 64 Cal. 513, 2 Pac. 399, held that a deed absolute in form, but given only as security, did not pass the legal title, and that the effect of the Code provision mentioned was to restore the rule laid down in *Cunningham v. Hawkins*, 27 Cal. 604, which had been overruled by the cases counsel cites. See, also, *Healy v. O'Brien*, 66 Cal. 519, 6 Pac. 386; *Raynor v. Drew*, 72 Cal. 308, 13 Pac. 866; *Webb v. Hosselton*, 4 Neb. 319, 19 Am. Rep. 638; *Lenox v. Reed*, 12 Kan. 223; *McLane v. Paschal*, 47 Tex. 365.

The petition for rehearing is denied.

(101 N. W. 310.)

STATE EX REL. JAMES C. MITCHELL V. LOUIS A. LARSON, COUNTY
AUDITOR.

Opinion filed October 31, 1904.

**Determination of Contest by State Central Committee Approved by
Convention Is Conclusive Upon Courts.**

1. Where the state central committee of a political party has heard and determined a contest, after notice and upon the merits, between contesting delegates to a state convention, as to the regularity of the county conventions by which they were elected, and its action has been affirmed by the convention, such determination is conclusive upon the courts, even as between rival nominees of such conventions for county offices. Following and affirming *State v. Liudahl*, 91 N. W. 950, 11 N. D. 320.

Same — Rival Conventions — County Auditor's Duty as to Official Ballot.

2. The relator was nominated by one of two rival Republican conventions for the office of county treasurer of Ward county. Both conventions elected delegates to the state convention. The question of regularity was presented by the delegates to the state central committee upon the merits for decision, and was determined in favor of the relator's convention, which action was affirmed by the state convention, and subsequently by a second state convention. *Held*, that it was the legal duty of the county auditor to print the names of the relator and his co-nominees upon the official ballot as the nominees of the republican party, and a writ of mandamus will be issued to compel him to do so.

Application by the state, on the relation of James C. Mitchell, for a writ of mandamus to Louis A. Larson, county auditor of Ward county, N. D.

Writ granted.

John E. Greene, for plaintiff.

James Johnson, A. M. Christianson and E. L. Sutton, for defendant.

YOUNG, C. J. The call of the Republican county central committee of Ward county for a county convention to be held in the city of Minot on May 14, 1904, to nominate county officers, and to elect delegates to the legislative, judicial and state conventions, resulted in the holding of two conventions—one known as the "Reorganizers' Convention," and the other as the "Murphy Convention." Each claimed to be the regular convention of the Republican party of that county, and each nominated a full set of candidates for county offices, and filed with the county auditor nominating certificates in due form. Each convention elected delegates to the Republican legislative and judicial conventions, and the two state conventions which were held in Fargo and Grand Forks on May 18th and July 20th, respectively. The question involved in this proceeding arises from an attempt on the part of the nominees of the two rival conventions to have their names printed upon the official ballot as the regular Republican nominees. The defendant is the county auditor of Ward county, and, as such, is charged with the duty of printing and distributing the official ballots. He is also the nominee of the Murphy Convention for the same office. The relator is the nominee of the Reorganizers' Convention for the office of county treasurer. Upon his application, and on October 26, 1904, an alter-

native writ of mandamus was issued by this court, commanding the defendant, as county auditor to cause the names of the nominees of the Reorganizers' Convention to be printed upon the official ballot in the Republican column, or to show cause to this court on the 31st day of October why he had not done so. Upon the return day, Joseph W. Briggs, who was nominated by the Murphy Convention for the office of register of deeds, requested and was granted leave to intervene and file an answer, and by request of defendant's counsel the answer presented by him, which was verified by both Briggs and the defendant, was accepted as the answer of the latter to the alternative writ. Before the answer was filed counsel for defendant, under a special appearance, moved to dismiss the alternative writ for alleged want of service. These as well as a number of other grounds urged in support of the motion are without merit, and the motion was denied.

It may be doubted whether the answer presents any issue whatever for determination. The affidavit of the relator alleges, and the answer substantially admits, that two state conventions have passed upon the question of the regularity of the two county conventions, and in each case sustained the so-called Reorganizers' Convention, which nominated the relator. Under these circumstances, the allegations of the relator's affidavit and of the answer relating to the proceedings taken by each convention, and the qualifications and number of delegates of which each was composed, and the cause and circumstances of the split, need not be stated. They are entirely immaterial.

This case presents the same questions which were considered in a decision by this court in *State ex rel. v. Liudahl*, 11 N. D. 320, 91 N. W. 950, in which the opinion was filed October 25, 1902, and is controlled in every respect by the decision in that case. In that case, as in this, two sets of nominees for county offices of rival county conventions sought to have their names printed upon the official ballot in the Republican column. It was shown that both conventions had elected delegates to the state convention, that the state central committee had heard the merits of the contest and decided it, and that its action had been approved by the convention. It was held, after careful consideration and a full review of the authorities, that under such circumstances the decision of the highest party tribunal of the state must be taken as conclusive upon the courts on the question of regularity. In that case it was said: "The

highest body or convention dictates as to policy and procedure of the lower organization, and decides differences existing therein, and thus is party organization effected and maintained. By affiliating with a party an elector recognizes party organization, and a nominee accepting a nomination contested by a nominee of a rival convention does so with knowledge that the regularity of his nomination is subject to decision by the highest authority of his party, when properly brought before it to determine the regularity of the convention at which he was nominated. In *re Redmon* (Sup.) 25 N. Y. Supp. 384. Disputes of this kind, involving the regularity of rival conventions, and involving the further question as to which set of county officers nominated by these rival conventions are entitled to recognition, are political questions, and should be settled by political bodies; and, in the absence of statutes conferring in unmistakable language upon the courts the right and duty to decide such controversies, they should not undertake to do so, when the highest organization of the party has passed upon the question, but suffer the same to remain in the domain of politics. Courts have occasionally been called upon to pass upon questions similar to the case at bar, and, when not based upon statute law, the rule that such decisions are most properly to be determined as to political questions by political conventions, or their committees duly authorized, seems to us founded on the best reasons." The following authorities sustain our conclusions in the above case, and may be added to those cited in the opinion: *Davis v. Hambrick*, 109 Ky. 276, 58 S. W. 779; *Blais v. Brazeau* (R. I.) 56 Atl. 186; *Williams v. Lewis* (Idaho) 54 Pac. 619; *State v. Weston* (Mont.) 70 Pac. 519. The opinion of the Supreme Court of Wisconsin in the recent case of *State v. Houser*, 100 N. W. 964, involving the regularity of two rival Republican state conventions, turned entirely upon a provision in the Wisconsin statutes. The National Republican Convention had recognized the so-called Stalwart Convention as the regular one, and had seated its delegates. The state central committee disregarded the action of the convention, and recognized the La Follette Convention, and declared and certified that its nominees were the regular nominees of the Republican party of that state. The court declined to investigate and determine which convention was regular in point of fact, or to go further than to ascertain which of the conflicting adjudications by the party authorities should control the secretary of state in preparing and printing the official ballot.

A majority of the court, under the coercion of a statute which required that "preference in designation shall be given to the nomination of one certified by the committee [held to mean state central committee], which has been officially certified to be authorized to represent the party," was constrained to hold that the decision of the state central committee was controlling. So far as that case touches the question, it supports the view that an adjudication by a party tribunal is conclusive upon the courts. In summarizing, Judge Marshall, who wrote the majority opinion, said: "We have ascertained that the highest party authority as recognized by our law has spoken upon the subject in hand. No jurisdictional defect in that regard has been found to exist. We must accept what it has decided to be the law." The members of the court who participated in the decision of the Liudahl case are confirmed in the assurance of the correctness of the conclusions therein announced, and the entire court is agreed that the conclusions announced in that case should be adhered to, and that they are controlling in this case. Counsel for defendant do not attack its soundness. They expressly disclaim any such purpose. As we understand it, they seek to avoid its application by claiming that the contest was not heard upon the merits by the state central committee. In this behalf it is alleged, in reference to the action taken by the Fargo convention, that the Murphy delegates presented to the state central committee, and offered in evidence before them, in support of their claim, "fifteen lengthy affidavits; * * * that said Republican state central committee held a short session, not exceeding ten minutes; and that in no manner considered the affidavits, credentials, or records presented to them, but, merely on motion of one of the members, seated the members of the so-called Reorganizers' delegates, without passing on the merits of the so-called Murphy delegates to participate in such convention." As to the proceedings at the Grand Forks convention, it is alleged that a contest was presented to the state central committee by the Murphy delegates, and that the committee acted without considering the affidavits and records presented to them, and denied their right to participate in the convention; that the committee on credentials thereafter appointed by the convention "refused to give the Murphy delegates the right to present their rights and their side of the matter, allowing them only ten minutes to do so; that it would have taken said committee several hours in which to examine the testimony which was offered by said

Murphy delegates; that said Murphy delegates were refused permission to present such matter to the Republican state convention; that said state central committee was prejudiced and partial." The evidence completely negatives the claim that there was no hearing before the state central committee at Fargo. It is shown that the controversy was presented to the committee for decision pursuant to the following written resolution, which was adopted at a caucus at which all the delegates were present in person or by proxy, and is signed by the chairman and secretary of the delegation: "Resolved, that it is hereby agreed that contest * * * shall be submitted for final determination to the state central committee, and we hereby agree to abide by the decision of said committee." Pursuant to the said agreement, the committee met on the night of May 17th to hear contests, and remained in continuous session and devoted its entire time from 9:30 to 12:30 o'clock to the hearing of this contest. Each faction was represented by an attorney and by three laymen. At the conclusion of the hearing the committee adjourned to go into executive session the following morning, at which time it was decided, by a vote of 28 to 8, that the Reorganizers' Convention was the regular one. This action was ratified by the committee on credentials, and affirmed by the state convention. To what extent the question was reinvestigated at the Grand Forks convention does not clearly appear, and it is not material. It does appear that a full hearing was had upon the merits at the Fargo convention, and that the decision of that convention was not revised or reversed by the subsequent convention at Grand Forks, but, on the contrary, was affirmed. Under these circumstances, the determination of the state central committee, followed by an affirmation by the convention upon the question of regularity, is conclusive; and it is the legal duty of the county auditor to print the relator's name, as well as the names of the other nominees of the Reorganizers' Convention upon the official ballot as the Republican nominees.

A peremptory writ will issue, commanding him to do so, and containing such further directions as shall be essential to accomplish the purpose of the writ. All concur.

(101 N. W. 315.)

ALICE E. JOHNSON v. TREADWELL TWICHELL.

Opinion filed November 1, 1904.

Sheriff's Sale of Homestead — Liability to Owner.

1. The sale by a sheriff, under execution, of real estate which is exempt as a homestead, conveys no estate or title to the purchaser, and the officer making such sale is not liable to the owner in an action for damages, except, perhaps, for costs incurred in removing an apparent cloud upon the title.

Appeal from District Court, Cass county; *Charles A. Pollock*, Judge.

Action by Alice E. Johnson against Treadwell Twichell. Judgment for plaintiff, and defendant appeals.

Reversed.

D. R. Pierce and Ball, Watson & McClay, for appellant.

The property involved, when sold under the Pierce judgment, either was or was not respondent's homestead. If the latter, it was rightfully seized and sold in satisfaction of the judgment, if the former it seems equally clear that its sale under execution carried no title to the purchaser.

The homestead is exempt from forced sale to satisfy claims like those merged in the Pierce judgment. Const. North Dakota, section 208; sections 3605, 5517, 5490, Rev. Codes 1899.

The pretended sale, if land was homestead, conferred no title and this action was not maintainable. *Kendall v. Clark*, 10 Cal. 17, 70 Am. Dec. 691; *Speller v. Lee*, 43 Ala. 381; *Harmon et al. v. State*, 82 Ind. 197.

As to legal effect of statutes exempting property from forced sale, see *Ketchin v. McCarley*, 11 S. E. 1090; *Roth v. Insley*, 24 Pac. 853; *Waggle v. Warthy*, 74 Cal. 266, 15 Pac. 831; *Ray v. Yarnell*, 20 N. E. 705; *Phillips v. Taber* 10 S. E. 270; *Trameek v. Martin*, 14 S. W. 564.

Taylor Crum, for respondent.

While a void sale of homestead passes no title, it casts a cloud upon the title that necessitates a removal. Proceedings to remove a cloud can only be brought by one in possession of the property. *N. P. Ry. Co. v. Paine*, 119 U. S. 561, 30 L. Ed. 513; *Lee v. Simpson*, 2 L. R. A. 660.

Party out of possession must pursue remedy at law, i. e. restitution or damages against officer. *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. Ed. 145; *Corvell v. Hayman*, 111 U. S. 176; 28 L. Ed. 390.

If sheriff is liable for sale of exempt personalty, why not for homestead after notice? *Northrop v. Cross*, 2 N. D. 433, 51 N. W. 718.

An action for trespass will lie against an officer and judgment creditor for sale of exempt homestead. *Waples on Homestead and Exemptions*, 756.

If the law requires the sheriff to sell off the homestead, he can not disregard it with impunity, and save the title from nullity and himself from damages. *Waples on Homesteads and Exemptions*, 731.

YOUNG, C. J. The plaintiff brought this action against the defendant as sheriff of Cass county to recover damages alleged to have been sustained by her because of the sale by the latter under execution of certain real estate in the city of Fargo which she claims was her homestead, and therefore exempt. The plaintiff alleged in her complaint that on May 16, 1901, a judgment was entered against her in the district court of Cass county for \$371.18 in favor of one D. R. Pierce, and on the same day an execution was issued, and levied by the defendant upon the property in question; that the same was sold on July 6, 1901, and was bid in by the judgment creditor; that said real estate was her homestead; that she had theretofore filed her homestead declaration for record in the office of the register of deeds, and served notice of her homestead interest upon the defendant at the time of the levy; that "by reason of the premises plaintiff has sustained damages in the full sum of \$371.18, for which sum she asks judgment, with interest at the rate of 7 per cent from and since the 16th day of May, 1901, together with the costs and disbursements." The defendant's answer denied that the property was a homestead, and also denied that the plaintiff had sustained damages in any sum whatsoever on account of his official acts complained of in the complaint. Defendant objected to the introduction of any evidence on the part of the plaintiff for the alleged reason "that the complaint does not state facts sufficient to constitute any cause of action against the defendant, and that no facts are set forth showing any damages or any grounds for liability upon the part of the defendant." Before this objection was ruled upon, and over defendant's objection,

plaintiff was permitted to amend her complaint, and allege "that on or about the 1st day of August, 1901 [which was after the execution sale], plaintiff entered into a contract of sale of said premises to one C. H. Sheils; * * * that before the date of redemption expired said Sheils paid and satisfied said judgment; * * * that as part of the contract of sale with said Sheils said judgment must be satisfied before he paid the full purchase price thereof; that said judgment of said Pierce was an apparent lien and cloud on plaintiff's title, and her financial condition was such that she could not clear said title." The previous objection to the introduction of evidence was renewed and overruled. At the close of the case defendant moved for a directed verdict in his favor "for the reason that upon the whole evidence" the jury would not be "warranted or justified in returning any verdict whatever in favor of the plaintiff," and also for the reason that it appeared from the undisputed testimony that the plaintiff had abandoned any homestead right which she may have had. This motion was denied, and the jury returned a verdict for the full amount claimed. Defendant moved for judgment notwithstanding the verdict, or for a new trial. This motion was also denied, and the defendant appeals from the order denying the same.

Counsel for defendant contend upon this appeal that the order should be reversed, and judgment ordered for defendant, and in support of this contention advance two reasons, either of which sustained, would require a reversal of the order. The first is that it appears from the undisputed testimony that prior to the sale the plaintiff had abandoned any homestead right which she may have had in the premises. It is patent that, if this contention is correct in point of fact, plaintiff is entitled to no damages, for in that event the sale was rightful. The second is that even if the homestead right existed when the defendant sold the property, nevertheless the complaint does not state a cause of action, in this: that it does not allege any facts which create a liability on the part of the defendant for making the sale. The basis of this last contention is that the execution sale of the homestead, if it was a homestead, conveyed nothing, and therefore the plaintiff was not damaged by the sale. Inasmuch as we fully agree with this contention, we need not consider whether the homestead was or was not abandoned, and may assume for the purpose of this case that the homestead right existed at the time of the sale. In this state

the homestead defined by law is, with certain exceptions which have no application here, "exempt from judgment lien and from execution or forced sale." Section 3605, Rev. Codes 1899. And it "is absolutely exempt from all such process, levy or sale. Subdivision 7, section 5517, Rev. Codes 1899. It is therefore clear—and this is well settled—that the sale of a homestead under execution is void, and conveys no estate or title to the purchaser. Freeman on Executions, vol. 2, section 215; Thompson on Homesteads and Exemptions, section 625, and cases cited. Also *Blue v. Blue*, 38 Ill. 9, 87 Am. Dec. 267, and cases cited in note at page 273, 87 Am. Dec. It is true an officer is liable where he denies the exemption to which a defendant is by law entitled, but his liability is only for the loss occasioned by his default or wrongful act. In case of the seizure and sale of personal property the measure of damages is ordinarily the value of the property of which the party has been wrongly deprived, but "in the case of a homestead, however, the rule is different. Such a sale is void, and the pretended purchaser gets no title. The defendant's damages, if any, cannot exceed the costs and damages which he may sustain by reason of the officer's neglect to lay off to him his homestead." Mechem on Public Officers, section 774. The text just quoted is supported by *Kendell v. Clark*, 10 Cal. 17, 70 Am. Dec. 691. In that case the plaintiff sued a sheriff for \$2,000 damages for selling his homestead under execution, and recovered judgment. This was reversed. The court said: "From the complaint itself it is clear that no damage has or can result from such a sale. If the property sold was a homestead, the sheriff's deed conveyed nothing. The purchaser at such sale could acquire no right to the property and the plaintiff suffer no injury." *McCracken v. Adler*, 98 N. C. 400, 4 S. E. 138, 2 Am. St. Rep. 340, is to the same effect. Assuming, then, that the property in question in this case was a homestead, and the sale was for this reason wrongful, the sale being void, no injury or loss can be predicated upon it. The plaintiff does not, in her complaint, attempt to charge the defendant for expenses incurred in removing a cloud from her title. In fact, no such action was instituted. What she does ask is to recover the amount of the Pierce judgment, which Sheils, her vendee, held out of the purchase price. It is evident that she has made the wrong party defendant. Her remedy, if any she has—that is, if the payment of the judgment by Sheils was unauthorized either in law or in fact—is against him for the balance of the purchase

price, and is not against this defendant. Neither the original nor amended complaint stated a cause of action, and the defendant's objection to the introduction of evidence should have been sustained, and the motion for judgment notwithstanding the verdict should have been granted.

The order appealed from will be reversed, and the district court is directed to enter judgment for defendant. All concur.

(101 N. W. 318.)

NEHEMIAH DAVIS V. MARTIN JACOBSON AND D. A. DINNIE.

Opinion filed November 1, 1904.

New Trial — Review.

1. Upon an appeal from an order granting a new trial, when the motion is made upon several grounds, the question is not whether the trial judge was warranted in granting it upon a particular ground referred to by him in the order, but whether, upon the whole record, and upon any of the grounds urged, it should have been granted.

It Is the Correctness of an Order, Not the Grounds Assigned for It, That Will Be Reviewed.

2. An order granting a new trial will not be reversed merely because the trial judge assigned a wrong reason for it. It is the correctness of the order, and not the reason assigned, that is involved upon the appeal.

Statement of the Case on Motion for New Trial.

3. Where a motion for a new trial is made in part upon the court's minutes, the order granting or denying the motion cannot be reviewed in the absence of a statement of the case embodying such portions of the evidence or proceedings as are necessary to a review of the specifications based thereon.

Appeal from District Court, Ward county; *Palda, Jr., J.*

Action by Nehemiah Davis against D. A. Dinnie and Martin Jacobson. Verdict for defendants. From an order granting a new trial, they appeal.

Affirmed.

E. L. Sutton, George A. Bangs and James Johnson, for appellants. Greenleaf & Leighton and Gammons & Barrett, for respondent.

YOUNG, C. J. The plaintiff brought this action to recover damages for personal injuries alleged to have been caused by defendant's negligence. The jury returned a verdict for defendant. The plain-

tiff made a motion for a new trial, which motion was granted. Defendant appeals from the order. The appellant has not presented a record upon which the order can be reviewed, and for this reason it must be affirmed without an examination of the merits.

The motion was made upon certain affidavits relating to the alleged misconduct of the defendant and certain jurors, and upon "the pleadings, papers, records and minutes of the court." The notice of intention set forth the following grounds for new trial: "(1) Irregularities in the proceedings of the court, jury and defendants, and especially the defendant D. A. Dinnie, by which this plaintiff was prevented from having a fair trial; (2) misconduct of the jury; (3) insufficiency of the evidence to justify the verdict, and that it is against law; (4) error in law occurring at the trial and excepted to by plaintiff"—and stated that "said motion, as to the first and second grounds therein, will be based upon the affidavits to be hereafter served, and, as to the third and fourth grounds hereof, will be based upon the minutes of the court." The notice of intention specified in detail the particulars in which the plaintiff claimed the evidence was insufficient to justify the verdict, and also specified a number of alleged errors in the admission of testimony. The plaintiff submitted affidavits in support of the first two grounds of the motion, and the defendant served a number of counter affidavits. The trial judge, in his order granting a new trial, stated that he was "satisfied that there was misconduct on the part of the defendant, D. A. Dinnie," and "that the jurors sitting in the trial of said cause were guilty of misconduct. * * *"

No statement of the case has been settled by the appellant, and he has thus failed to present to this court a record upon which we may determine whether the attack upon the sufficiency of the evidence to justify the verdict, and the several attacks upon the rulings upon the admission of testimony, were or were not well grounded. The appellant's abstract contains merely the affidavits relating to the alleged misconduct. His counsel have apparently assumed that, if this particular ground for a new trial was not well taken, the order must be reversed. This is entirely erroneous. Upon an appeal from an order granting a new trial, when the motion is made upon several grounds, the question is not whether the trial judge was warranted in granting it upon a single ground, or upon a particular ground referred to by him in his order, but is rather whether upon the whole record and upon any of the grounds urged, it

should have been granted. The presumption is that the order was properly granted, and the burden upon the appellant to show that none of the grounds urged in the motion was sufficient. To do this, he must present a sufficient record for reviewing each ground; and, where the motion is in whole or in part made upon the court's minutes, a statement of the case must be settled, embodying such portion of the evidence or the proceedings as is essential to a review of the specifications based thereon. *Bank v. Gilmore*, 3 N. D. 188, 54 N. W. 1032; *Bowen v. Malbon*, 20 Wis. 517; *Hubbard v. Town of Lyndon*, 24 Wis. 231; *Oakland Gas Light Co. v. Dameron*, 57 Cal. 292; *In re Yoakam's Estate*, 103 Cal. 503, 37 Pac. 485; *Leonard v. Shaw*, 114 Cal. 69, 45 Pac. 1012; *Perego v. Dodge*, 9 Utah, 3, 33 Pac. 221; *Ashe v. Beasley & Co.*, 6 N. D. 191, 69 N. W. 188; *McMillan v. Conat*, 11 N. D. 256, 91 N. W. 67; *King v. Hanson* (N. D.) 99 N. W. 1085.

It is also well settled that an order granting a new trial will not be reversed merely because the trial judge assigned an erroneous reason for making it. It is the correctness of the order, and not the reason assigned for it by the trial judge, that is to be reviewed in this court, and it is only when all of the grounds urged in support of the motion are insufficient that it will be reversed. *Bolton v. Stewart*, 29 Cal. 615; *Grant v. Moore*, Id. 644; *Coghill v. Marks*, Id. 673; *White v. Merrill*, 82 Cal. 14, 22 Pac. 1129; *In re Kingsley's Estate*, 93 Cal. 576, 29 Pac. 244; *Tribune Co. v. Barnes*, 7 N. D. 591, 75 N. W. 904; 2 *Spelling on New Trial and Appeal*, section 693, and cases cited.

It follows that the order appealed from must be affirmed, and it is so ordered. All concur.

(101 N. W. 314.)

DANIEL MEEHAN V. GREAT NORTHERN RAILWAY COMPANY.

Opinion filed November 5, 1904.

Opinion Evidence Incompetent Upon Facts Which Jury Can Understand and Form Opinions On.

1. The opinion of expert witnesses as to which of two or more causes produced a given effect are not admissible in evidence, where the conditions necessary to the operation of the different causes can be described with sufficient clearness, so that the jury can understand them, and intelligently form an opinion.

Plaintiff Must Show That His Injury Arises from a Cause for Which Defendant Is Responsible.

2. In an action to recover damages for an injury alleged to have been caused by defendant's negligence, where it appears that there were two or more possible causes of the injury, only one of which is chargeable to defendant's negligence, the burden is upon the plaintiff to make it appear that it was more probable that the injury resulted from the cause for which the defendant was responsible.

Master Must Keep in Repair Appliances Furnished Employees.

3. It is the master's duty not only to provide proper appliances for the use of his employees, but also to exercise ordinary care to keep the appliances in good repair.

Same — Cannot Delegate the Duty.

4. The master's duty to provide proper appliances and to keep them in good repair cannot be delegated so as to avoid personal responsibility for the due performance of the duty.

Master Liable Only When He Knows, or Ought to Know, of Defect.

5. The master is not liable to his employe for an injury caused by a defect in appliances resulting solely from use, unless the master knew or ought to have known of and remedied the defect.

Same.

6. The employe does not assume the risk of injury caused by the master's negligence, where he had no knowledge of the existing danger.

Judgment Notwithstanding the Verdict.

7. To justify an order for judgment notwithstanding the verdict, the record must affirmatively show, not only that the verdict is not justified by the evidence, but it must also appear that there is no reasonable probability that the defects in the proof necessary to support the verdict may be remedied on another trial.

Appeal from District Court, Grand Forks county; *Fisk, J.*

Action by Daniel Meehan against the Great Northern Railway Company. Verdict for plaintiff. From an order denying judgment notwithstanding the verdict, or a new trial, defendant appeals.

Reversed.

C. Wellington and *C. J. Murphy*, for appellant.

Expert testimony and opinion evidence based upon a proper foundation, and allowed, as a rule, upon questions of science, art, medicine and mechanics, where, from the nature of the subject

examined, the fact upon which the opinions are based cannot be passed upon by the average man or juror, but where the facts can be placed before the jury in such a manner that they are just as competent to form an opinion or draw an inference as the witness is, then there is no room for expert or opinion evidence. *Overby v. C. & O. Ry. Co.*, 53 A. & E. Ry. Cases, 417.

The position of the head brakeman was at the head end of the train, or on the engine; and to observe the running of the trains, and watch for breaking in two of trains. Failure to instruct jury, that if they found that plaintiff was out of his proper place and such neglect was the proximate cause of his injury, he could not recover, was error. *Green v. Br. & N. M. Ry.*, 88 N. W. 974.

Excessive damages appearing to have been given under influence of passion or prejudice is, in North Dakota, a ground for a new trial. *Kennedy v. St. Paul City Ry. Co.*, 60 N. W. 810; *Thompson v. Chicago, St. P. & K. C. Ry. Co.*, 73 N. W. 707; *Standard Oil Co. v. Tierney*, 27 S. W. 963; *Wood v. L. & N. R. Co.*, 88 Fed. 44; *Brown v. Southern Pac. Ry. Co.*, 26 Pac. 579.

No presumption of negligence can flow from the mere happening of this accident. Trains often part from various causes. *Kinkad v. O., S. L. & U. N. Ry.*, 53 A. & E. Ry. Cases, 248.

Plaintiff assumed the risk consequent upon the liability of the trains upon which he was employed to part. *Alcorn v. C. & A. R. Co.*, 108 Mo. 81; *Rodgers et al. v. Leydon*, 26 N. E. 210; *Reitman v. Stolte*, 22 N. E. 304.

Where a servant has equal means of knowledge of danger with his master, so that they stand on equal footing, and the servant is not specifically commanded as to time and manner of doing work, but when told to do a particular thing has such discretion that he can control the means, time and manner of doing the work, then, unless he does it in the way and with the means which will be safest, he is guilty of contributory negligence. *English v. C., M. & St. P. Ry.*, 24 Fed. 906; *Claus v. N. S. Co.*, 89 Fed. 646; *Sours v. Great Northern Ry. Co.*, 87 N. W. 766; *Chicago & N. W. Ry. v. Davis*, 53 Fed. 61; *Schaivle v. L. S. & M. S. Ry. Co.*, 56 N. W. 565; *Keys v. Pa. Co.*, 3 Atl. 15; *Collins v. B., C. & N. Ry. Co.*, 49 N. W. 848.

P. J. McLaughlin and Geo A. Bangs, attorneys for respondent.

Expert and opinion evidence is admissible in all matters involving peculiar or special knowledge. The subjects are not confined to

classed and specified professions; wherever special or peculiar skill or judgment applied to a particular subject is required to explain results or trace them to their causes, expert and opinion evidence is applicable. *Story v. Maclay*, 3 Mon. K. 480; *Clifford v. Richardson*, 18 Vt. 620; *Sturges v. Knapp*, 33 Vt. 486; 2 *Taylor on Evidence*, section 1275; *Krippner v. Biebel*, 9 N. W. 671.

The qualification of the witness is in the discretion of the court, and the ruling is reviewable only in case of abuse. *City of Ft. Wayne v. Coombs*, 7 N. E. 743; *Stillwell & Bierce Mfg. Co. v. Phelps*, 130 U. S. 520, 9 Sup. Ct. Rep. 601; *Fruit Dispatch Co. v. Murray*, 96 N. W. 83.

The running and operation of trains is so far an act outside of the experience and knowledge of ordinary persons as to render the opinions of experts admissible. *Belle Fontaine R. R. Co. v. Bailey*, 11 Ohio St. 333; *Illinois Central R. R. Co. v. Reedy*, 17 Ill. 580; *Cooper v. Central R. R. Co.*, 44 Ia. 140; *Brabbitts v. Chicago & N. W. Ry. Co.*, 38 Wis. 289; *Davidson v. St. Paul, M. & M. Ry. Co.*, 24 N. W. 324; *Chicago Ry. Co. v. Shannon*, 43 Ill. 339; *Grand Rapids Ry. Co. v. Huntley*, 38 Mich. 537; *Whitsett v. Chicago, R. I. & P. Ry. Co.*, 25 N. W. 104; *Kolsti v. Minneapolis & St. L. Ry. Co.*, 19 N. W. 655.

Expert testimony on various subjects was admitted in the following cases, in which it was held that the discretion of the court was not abused: *Olmstead v. Gere*, 100 Penn. St. 127; *Leopold v. Van Kirk*, 29 Wis. 548; *Mayo v. Wright*, 29 N. W. 832; *Kraatz v. Brush Electric Light Co.*, 46 N. W. 787; *Kuhns v. Wisconsin, I. & N. Ry. Co.*, 31 N. W. 868; *Tebo v. City of Augusta*, 63 N. W. 1045; *Woodward v. Ry. Co.*, 122 Fed. 66; *Healy v. Visalla & T. Ry. Co.*, 36 Pac. 125; *Yarnish v. Tarbox*, 59 N. W. 300; *Peerless Mach. Co. v. Gates*, 63 N. W. 260; *Little Rock v. Shoecraft*, 56 Ark. 465; *Camp Point v. Balou*, 71 Ill. 417; *Laird v. Snyder*, 26 N. W. 654; *Ruglehaupt v. Young*, 17 S. W. 710; *International v. Klaus*, 64 Tex. 293; *Horam v. Chicago, St. P., M. & O. Ry. Co.*, 56 N. W. 507; *Haviland v. Manhattan Ry. Co.*, 15 N. Y. Supp. 898; 131 N. Y. 630, 30 N. E. 864; *Pullman v. Smith*, 14 S. W. 993; *Kendrick v. Central Railroad & Banking Co.*, 15 S. E. 685; *Williamson v. Vinling*, 80 Ind. 379; *Taylor v. Baltimore & O. Ry. Co.*, 10 S. E. 29; *McCray v. Ry. Co.*, 34 S. W. 95.

The damages were not excessive. As illustrating the amounts in various cases that have been approved, see the following cases:

Thompson v. Chicago, St. P. & K. C. Ry. Co., 73 N. W. 707; Roth v. Union Depot Co., 31 L. R. A. 855, 43 Pac. 641; Chipman v. Union Pac. Ry. Co., 41 Pac. 562; Karasich v. Kasbrouck et al., 28 Wis. 569; Schultz v. Chicago, M. & St. P. Ry. Co., 48 Wis. 375.

On judgment notwithstanding the verdict, the question, whether the defendant was negligent, was for the jury. McCreary v. Ry. Co., 69 S. W. 1037.

In determining this question the evidence should be considered according to the proof which it was in the power of the one side to produce and in the other to contradict, and the omission of a party to testify to facts in his knowledge, is also to be considered. McDonough v. O'Niel, 113 Mass. 92; Jansen v. Thomas, 81 Fed. 578; East Tenn. Ry. Co. v. Douglass, 19 S. E. 885.

That the train parted under the circumstances as it did, was prima facie evidence of negligence and entitled the plaintiff to have his case submitted to the jury. Kirst v. M., L. S. & W. Ry. Co., 1 N. W. 89; Mulcairns v. City of Janeville, 29 N. W. 565; Sheridan v. Foley, 33 Atl. 484; Ryder v. Kinsey, 64 N. W. 94; Seyvall v. Ry. Co., 95 N. Y. 562; Carrol v. Chicago, B. & N. Ry. Co., 75 N. W. 176.

It was not necessary to show the specific defect which caused the train to part. Missouri etc. Ry. Co. v. Hawk, 69 S. W. 1037.

It is the absolute duty of the master not only to furnish reasonably safe instrumentalities, but to see that they are kept and maintained in a reasonably safe condition. Shortel v. City of St. Joseph, 16 S. W. 583; Dorsey v. Construction Co., 42 Wis. 583; Cook v. St. Paul, M. & M. Ry. Co., 24 N. W. 311; Mullin v. Northern Mill Co., 55 N. W. 1115; Hooper v. Great Northern Ry. Co., 83 N. W. 440; Perras v. A. Booth & Co., 84 N. W. 739, 85 N. W. 179; Olmscheid v. Nelson-Tenney Lbr. Co., 68 N. W. 605; Malcolm v. Fuller, 25 N. E. 83; Loucks v. Chicago, M. & St. P. Ry. Co., 18 N. W. 651.

Plaintiff was not guilty of contributory negligence. To charge him with such, the evidence must be so clear as to leave no room to doubt and all the material facts must be conceded or established beyond controversy. Field on Damages, 519; Beach on Contributory Negligence, section 447; Ry. Co. v. Sharp, 63 Fed. 532; Chicago, M. & St. P. Ry. Co. v. Lowell, 151 U. S. 209, 14 Sup. Ct. Rep. 281, 38 L. Ed. 131; Bluedorn v. Ry. Co., 18 S. W. 1103; Weller v. Ry. Co., 25 S. W. 532.

Negligence which is not the proximate cause of the injury is not contributory negligence. *Ry. Co. v. Mansburger*, 65 Fed. 196; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. Rep. 653, 35 L. Ed. 270; *Boyle v. Degnan*, 61 N. Y. S. 1043; *Bassett v. Fish*, 75 N. Y. 303; *Mather v. Rillston*, 156 U. S. 399, 15 Sup. Ct. Rep. 464; *Ry. Co. v. Steinburg*, 17 Mich. 99; *Park v. O'Brien*, 23 Conn. 347; *Christianson v. Northwestern Compo-Board Co.*, 85 N. W. 826.

From no point of view was the defendant entitled to a judgment notwithstanding the verdict. It will not be rendered unless the right is clear, and if the evidence lacking to sustain a cause of action may be supplied, such judgment should not be granted. *Cruikshank v. St. Paul Fire & Marine Ins. Co.*, 77 N. W. 958; *Kreatz v. St. Cloud School Dist.*, 81 N. W. 533; *Jaroszeski v. Osgood & Blodgett Mfg. Co.*, 83 N. W. 389; *Bragg v. Chicago, M. & St. P. Ry. Co.*, 83 N. W. 511; *Aetna Indemnity Co. v. Schroeder*, 12 N. D. 110, 95 N. W. 436.

INGERUD, J. Plaintiff sued to recover damages for personal injuries alleged to have been sustained through the negligence of the defendant, and obtained a verdict for \$8,000 damages. Defendant moved in the alternative for judgment notwithstanding the verdict or for a new trial, and appealed from the order denying both motions.

The complaint alleged, in substance, that on April 10, 1902, the plaintiff was the head brakeman on defendant's freight train which ran from Grand Forks to Walhalla and return; that while the train was running between Grafton and Minto on the return trip the plaintiff, while in the discharge of his duties, and exercising due care, was proceeding along the top of the train from the caboose towards the engine, and fell off the end of one of the cars, and received the injuries complained of; that, unknown to plaintiff, the train had broken in two, and he fell off of the front end of the rear portion because of the unexpected break in the train. The particular negligence complained of as the proximate cause of the injury is, in substance, that the couplings on the two cars which separated were so imperfectly constructed, and were so twisted and broken, worn and out of repair, that they became disconnected, and thus caused the train to break in two.

The defenses relied upon are that there was no negligence on the part of the defendant; contributory negligence on the part of the

plaintiff; and that the injury resulted from a danger incident to the business, the risk of which the plaintiff assumed by his contract of employment.

The evidence shows that while the freight train in question upon which plaintiff was employed as head brakeman was running from Grafton to Minto, at about 11 o'clock on the night of April 10, 1902, the train parted near the middle. The train consisted of about forty cars. The engineer and fireman did not notice the break, and went on with the front portion of the train to Minto, a distance of about ten miles from Grafton, before they discovered that the train had parted. The rear portion, upon which the plaintiff was riding, traveled on, with gradually diminishing speed, until it came to a stop about four and one-half miles from Grafton. The plaintiff's post of duty was at the front end of the train, but he had got into the caboose when the train pulled out of Grafton, and stayed in the caboose long enough to eat his lunch. After eating his lunch he started for the front end of the train, and in order to do so he had to pass over the tops of the cars between the caboose and the engine. When he reached the front end of the detached portion of the train, he discovered the break, but, as he claims, too late to save himself, and consequently walked or fell off the front end of the front car, and was injured. After he fell, the detached part of the train moved only five or six feet before coming to a stop. All the cars in the train were equipped with the automatic couplers in common use on such trains. The couplers between the rear car of the front part of the train and the front car of the rear portion of the train had in some manner become disconnected. It is conceded that such couplers as those in question may, and, not infrequently do, part by reason of any one of three causes: (1) By slipping apart by reason of wear; (2) by the pin "pinching" up so as to permit the knuckles to unlock; (3) by the "jumping" of the drawbars one above the other. The first only, of the above three causes, under the facts of this case, can be attributed to defendant's negligence. Under such circumstances mere proof of the accident does not cast upon defendant the burden of showing the real cause of the injury and negating possible negligence. The burden of proof was upon the plaintiff to prove by a preponderance of the evidence that the parting of the train was due to the wear of the couplers. *Balding v. Andrews*, 12 N. D. 267, 96 N. W. 305; *Smith v. Bank*, 99 Mass.

605, 97 Am. Dec. 59; Kinkhead v. Ry. Co. (Or.), 29 Pac. 3. Immediately after the accident the drawbars and couplers which parted were examined by the conductor. He testified as a witness for plaintiff, and his testimony is the only direct evidence in the case as to the condition of the drawbars and couplers at the time of the accident. He testified, in substance, that the drawbars and couplers were in good order; that they showed only such wear as usually appears when couplers are in use, but not sufficient to permit the couplers to slip apart. No direct proof was made except that of the conductor as to what extent the couplers were worn, or that the wear in any way rendered the couplers unsafe or unfit for the use to which they were put. Plaintiff sought to make this proof by opinion evidence, and several assignments of error relied upon by appellant are predicated upon the rulings admitting these opinions. The following questions and answers fairly disclose the line of inquiry objected to. Plaintiff was asked: "Q. In view of the smooth condition of the track, the condition of the couplers as testified to by Mr. Ingersoll [the conductor], the rate of speed at which this train at any time was moving prior to the time it parted in two, I will ask you to state, from your knowledge and experience as a brakeman, whether or not the train could have parted if the knuckles had not been in a worn condition. A. No, they could not." One Kingsley, who had had several years' experience as a brakeman and conductor, was sworn as a witness for plaintiff. He had no personal knowledge of the accident, or the facts and circumstances surrounding it. Plaintiff's version of the facts testified to were recited to him, and he was asked to state whether, in his opinion, the train parted by reason of the worn condition of the couplers. He answered in the affirmative. Aside from the testimony of the conductor above set forth, the only facts upon which to base the opinions of these witnesses was certain testimony to the effect that the highest rate of speed of the train between Grafton and Minto was eight to ten miles per hour; that sags or depressions in the track may cause couplers to part by "jumping" one above the other. There is no proof that sags or depressions are the only causes which may account for couplers "jumping" apart. The plaintiff testified that the track between Grafton and the place of the accident was "smooth and level;" that sags or depressions are easily detected by trainmen when the train is in motion, and that he did not notice any.

It will be seen from the foregoing that these witnesses were permitted to give their opinions upon a vital issue in the case, which was to be determined by the jury. They were not testifying to facts within their knowledge, but simply expressed opinions as to what conclusions should be drawn from the facts. Our views on the subject are accurately expressed by the following quotation from the opinion of Judge Earl in *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544: "The general rule of law is that witnesses must state facts within their knowledge, and not give their opinions or their inferences. To this rule there are some exceptions, among which is expert evidence. * * * It is not sufficient, to warrant the introduction of expert evidence, that the witness may know more of the subject of inquiry and may better comprehend and appreciate it than the jury; but, to warrant its introduction, the subject of the inquiry must be one relating to some trade, profession, science or art in which persons instructed therein by study or experience may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have. The jurors may have less skill and experience than the witnesses, and yet have enough to draw their own conclusions and do justice between the parties. Where the facts can be placed before a jury, and they are of such a nature that jurors generally are just as competent to form opinions in reference to them and draw inferences from them as witnesses, then there is no occasion to resort to expert or opinion evidence. To require the exclusion of such evidence, it is not needed that the jurors should be able to see the facts as they appear to eye witnesses, or to be as capable to draw conclusions from them as some witnesses might be, but it is sufficient that the facts can be presented in such manner that jurors of ordinary intelligence and experience in the affairs of life can appreciate them, can base intelligent judgment upon them, and comprehend them sufficiently for the ordinary administration of justice. The rules admitting the opinions of experts should not be unnecessarily extended. Experience has shown that it is much safer to confine the testimony of witnesses to facts in all cases where that is practicable, and leave the jury to exercise their judgment and experience upon the facts proved. Where witnesses testify to facts, they may be specifically contradicted, and, if they testify falsely, they are liable to punishment for perjury. But they may give false opinions without fear of punishment. It is generally safer to take the judg-

ments of unskilled jurors than the opinions of hired and generally biased experts." See, also, *Muldowney v. Ry. Co.*, 36 Iowa, 462; *Bemis v. R. R. Co.*, 58 Vt. 636, 3 Atl. 531. If these witnesses had learned from their experience as railroad men what various causes might make these couplers separate, and what conditions were essential to set these several causes in operation, they would be qualified to testify as experts, and inform the jury under what conditions each cause would or would not operate. With this information before them, the jury were as well qualified to determine the cause of the break in the train as the expert witnesses. The conditions under which these causes might operate were not of such a nature that they could not be adequately described with sufficient clearness to enable a person of average intelligence to understand them. There was no occasion or necessity for the opinions objected to, and the testimony should have been excluded. The admission of this testimony was clearly prejudicial, and the defendant's motion for a new trial should have been granted.

Appellant, however, insists that it is entitled to judgment notwithstanding the verdict, under chapter 63, p. 74, Laws 1901. It is contended that the evidence in this case is insufficient to establish any negligence on defendant's part; that it shows that the injury was due to plaintiff's own want of care, and that the injury resulted from a hazard of the business the risk of which plaintiff assumed by his contract of employment; that defendant's motion for a directed verdict on these grounds should have been granted, and hence that a judgment notwithstanding the verdict should be ordered. Judgment notwithstanding the verdict is not warranted in every case where a directed verdict has been erroneously denied. To justify such judgment, the record must affirmatively show not only that the verdict is not justified by the evidence, but it must also appear from the nature of the case and the circumstances connected with it, that there is no reasonable probability that upon another trial the defects in or objections to the proof necessary to support the verdict may be remedied. *Richmire v. Elevator Co.*, 11 N. D. 453, 92 N. W. 819; *Aetna Indemnity Co. v. Schroeder*, 12 N. D. 110, 95 N. W. 436; *Merritt v. Ry. Co. (Minn.)*, 84 N. W. 321. The record before us tends rather to suggest than to negative the probability of additional evidence being produced on another trial relative to the question of defendant's alleged negligence and plaintiff's alleged want of care. Such additional evidence, if fur-

nished, may supply the present insufficiency of proof of the former and overcome the inferences which it is claimed establish contributory negligence. If the injury was proximately caused by defective couplers, and the defect was due to defendant's negligence, it is clear, under the circumstances disclosed by the evidence before us, that the plaintiff did not assume the risk of injury from that cause. It is not claimed that he knew of the alleged defects in the couplers, nor is it claimed that the defendant habitually used defective couplers. An employe does not assume the risk of injury from an unknown danger caused by the master's negligence. *Woutilla v. Lumber Co.*, 37 Minn. 153, 33 N. W. 551, 5 Am. St. Rep. 832; *Southern Pac. Ry. Co. v. Yeagin*, 109 Fed. 436, 48 C. C. A. 497; *Dorsey v. Construction Co.*, 42 Wis. 583; *Greene v. Ry. Co.*, 31 Minn. 248, 17 N. W. 378, 47 Am. Rep. 785. Although we are agreed that there was an insufficiency of competent testimony to establish negligence on defendant's part, and that a motion for a directed verdict on that ground should have been granted, yet, for the reasons above stated, the motion for judgment notwithstanding the verdict was properly denied.

As a guide in the future disposition of this case, we will state briefly the reasons why we deem the evidence insufficient to establish defendant's negligence. Under the circumstances disclosed by the evidence in this case, and assuming that the parting of the couplers was the proximate cause of the injury, it is essential to plaintiff's right to recover that he establish by a preponderance of the evidence two facts: (1) That the train parted by reason of defective couplers; (2) that the defect in the couplers was known, or ought to have been known, to the defendant. The complaint charged the defendant with negligence in this: That the defendant had omitted to perform the duty which it, as master, owed to its employes to furnish proper appliances and to keep them in repair. It was undisputed that the first part of this duty had been performed. The couplers were free from defects when originally placed in the cars. It is claimed, however, that they had become unfit for use by wear. It is not claimed that the defendant, or any of its agents, servants or employes, had knowledge of the unsafe condition of the couplers. With respect to the master's duty to keep appliances in repair for the use of his employes the rule is that the master must use ordinary care (such care as a prudent man would ordinarily exercise), and such diligence, in the way of inspection, to detect

the need of repairs, as reasonable prudence ordinarily requires, in view of the circumstances attending the use of the appliances in question. Rev. Codes 1899, section 4097; *Cameron v. Ry. Co.*, 8 N. D. 124, 77 N. W. 1016; *Deppe v. Ry. Co.*, 36 Iowa, 52; *Anderson v. Ry. Co.*, 107 Mich. 591, 65 N. W. 585; *Park Hotel Co. v. Lockhart*, 59 Ark. 465, 28 S. W. 23; *Carruthers v. Ry. Co.*, 55 Kan. 600, 40 Pac. 915; *Tuck v. Ry. Co. (Ala.)*, 12 South. 168; *Moon v. Ry. Co.*, 46 Minn. 106, 48 N. W. 679, 24 Am. St. Rep. 194; *Smith v. Ry. Co.*, 42 Wis. 520. This duty cannot be delegated so as to relieve the master from personal responsibility for its due performance. *Hough v. Ry. Co.*, 100 U. S. 213, 25 L. Ed. 612; *Northern Pacific R. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; *Union Pacific Ry. Co. v. Snyder*, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597. Applying these rules to this case, even if we assume that the couplers parted by reason of wear, we find no evidence sufficient to warrant the conclusion that the defendant had omitted its duty with respect to repair. It follows, from the rules we have stated, that a master is not liable for his employe's injury, caused by the appliance becoming out of repair, when the defect is unknown to the master, unless it is shown that the defect ought to have been discovered and remedied if the master had performed his duty to exercise reasonable prudence and ordinary care to detect and remedy such defect. The mere fact that an injury is caused by defective appliances does not prove negligence unless the defect is of such a nature that reasonable prudence and ordinary care ought to have discovered it. In this case there is no direct evidence as to the extent of the wear except that of the conductor. Although his testimony tends to negative the fact, the plaintiff sought to have the jury infer from circumstantial and opinion evidence not only that the wear was sufficient to permit the couplers to slip apart, but also to go further, and from the first inference draw the further conclusion that the wear was of such extent that the defendant ought to have discovered and remedied it. Such attenuated inferences cannot take the place of evidence. The evidence is equally unsatisfactory as to the cause of the parting of the couplers. It would serve no useful purpose to discuss it in detail. Suffice it to say that, after eliminating the objectionable opinion evidence, there is not sufficient evidence from which it can be determined which of the three possible causes brought about the accident. It was not necessary for the plaintiff to exclude the

possibility of the non-negligent causes, but it was incumbent on him to furnish proof, direct or circumstantial, sufficient to reasonably justify the conclusion that there was a greater probability that defective couplers caused the accident than that either of the other two possible causes produced the result. *Cameron v. Ry. Co.*, 8 N. D. 124, 77 N. W. 1016; *Whitney v. Clifford*, 57 Wis. 156, 14 N. W. 927; *Shearman & Redfield on Negligence*, sections 57, 58; *Wason v. West (Me.)*, 3 Atl. 911.

The order denying the motion for a new trial is reversed, and a new trial ordered. All concur.

(101 N. W. 183.)

MAY V. THOMPSON V. THE TRAVELERS INSURANCE COMPANY.

Opinion filed November 17, 1904.

Life Insurance — Construction of Policy.

1. The life insurance policy upon which this action is brought contained this condition: "This policy shall not take effect unless the first premium is actually paid while the assured is in good health." *Held* that, in the absence of an estoppel, the liability of the insured depends upon the actual, and not mere apparent, good health of the assured when the first premium was paid.

To Estop an Insurer by His Retention of Premiums, He Must Act Upon Knowledge of the Facts.

2. In order that the acceptance or retention of the premium may estop an insurer from relying upon a breach of condition in the policy, it must appear that it had knowledge of the facts constituting the breach.

A Change in Condition of Applicant's Health Pending Negotiation for Insurance Must Be Disclosed.

3. Where, pending negotiations for a contract of life insurance, a material change in the condition of the applicant's health occurs, such as would influence the judgment of the insurer in accepting or declining the risk, the applicant is under obligation to make disclosure of the fact.

Health of Assured — Evidence — Practice.

4. The disease which the defendant claims the insured had when the first premium was paid, and from which he died, was not known to the attending physician or others until the day of assured's death, or to the insurer until disclosed by the proofs of death. Under these circumstances, the admission of, and subsequent refusal to strike

out, testimony to the effect that neither the insurer nor its agents returned or offered to return the premium, and that it made no inquiry as to the assured's health when the premium was paid, was prejudicial error, for which a new trial should have been granted.

Appeal from District Court, Barnes county; *Glaspell, J.*

Action by May V. Thompson against the Travelers Insurance Company. Judgment for plaintiff, and defendant appeals.

Reversed.

John E. Greene, for appellant.

The evidence is insufficient to support the verdict on the ground of good health. Good health is that condition wherein the body is free from any disease or ailment which tends to shorten life or permanently impair the health; a state of health which is free from any disease or ailment that seriously affects the general healthfulness of the system. *Richards on Insurance* (2d Ed.), 199; *Grattan v. Met. Life Ins. Co.*, 92 N. Y. 274; *Bancroft v. Home Benefit Assn.*, 120 N. Y. 14; *Plumb v. Penn. Mutual Life Ins. Co.*, 65 N. W. 611; *Met. Life Ins. Co. v. Howle*, 62 Ohio St. 204; *Manhattan Life Ins. Co. v. Carder*, 82 Fed. 986.

The evidence was insufficient to establish a waiver. An agent to solicit applications, deliver policies and collect premiums upon receipts countersigned by the state agent, cannot waive conditions or forfeitures, and his knowledge is not to be imputed to the insurer. *Kirkman v. Farmers Ins. Co.*, 57 N. W. 952; *Globe Mut. of N. Y. Ins. Co. v. Wolff*, 95 U. S. 326, 24 L. Ed. 387; *Heath v. Springfield Fire Ins. Co.*, 58 N. H. 414; *Maier v. Fidelity Mut. Life Ins. Co.*, 24 C. C. A. 239; *Clemens v. Superior Assem. Royal Society of Good Fellows*, 30 N. E. 496; *Bartreau v. Ins. Co.*, 67 N. Y. 595; *Levell v. Royal Arcanum*, 30 N. Y. Supp. 205; *Wood on Ins.*, sections 413 and 435; *Alexander v. Germania F. Ins. Co.*, 66 N. Y. 464; *Northern Assurance Co. v. Building Assn.*, 183 U. S. 308; *Richards on Ins.*, 99; *Sun Ins. Co. v. Texarkana F. & M. Co.*, 4 Tex. Civ. App. 398.

Winterer & Winterer, for respondent.

Good health does not necessarily mean absolute freedom from any ill, pain or indisposition. *May on Insurance* (2d Ed.), 387; *Connecticut Mutual Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 5 Sup. Ct. Rep. 119, 28 L. Ed. 708; *Brown v. Metropolitan Life*

Ins. Co., 32 N. W. 610; Clemens v. Mutual Life Ins. Co., 20 Pa. Sup. Ct. 567; Woodmen etc. v. Locklin, 67 S. W. 331.

The defendant by accepting, retaining and appropriating the premium and delivering the policy with full knowledge of assured's health on the date when the premium was paid and the policy was delivered, has by such acts waived the provision in the policy that it should not take effect if the assured was not in good health and it is estopped to deny the validity of the policy. Lightbody v. North American Ins. Co., 23 Wend. 18; Hubbard v. Hartford Ins. Co., 33 Ia. 325, 11 Am. Rep. 125.

Knowledge of the soliciting agent material to a risk would be the knowledge of the insurance company, and it would be bound thereby. Jordan v. State Ins. Co., 19 N. W. 917; Stone v. Hawkeye Ins. Co., 28 N. W. 47; Goodwin v. Provident Sav. Life Ins. Co., 66 N. W. 157.

When an agent to procure and forward applications for insurance makes out an application incorrectly, notwithstanding all the facts are correctly stated to him by the applicant, the error is chargeable to the insurer and not to the insured. American Life Ins. Co. v. Mahone, 21 Wall. 152, 22 L. Ed. 593; Miner v. Phoenix Ins. Co., 27 Wis. 693; Wians v. Allemania Fire Ins. Co., 38 Wis. 342; Brandup v. Insurance Co., 27 Minn. 393, 7 N. W. 735; Wood on Insurance, chapter 12; May on Ins., section 120; Power v. Morton Ins. Co., 80 N. Y. 111; Mut. Reserve Fund v. Summers, 107 Fed. 418; Johnson v. Dak. F. & M. Ins. Co., 1 N. D. 167, 45 N. W. 799.

Knowledge of its agent for soliciting insurance and collecting premiums, or facts justifying insurer in forfeiting a policy, is binding on it, though not communicated. N. W. Life Assurance Co. v. Bodurtha, 53 N. E. 787; Union Cent. Life Ins. Co. v. Halloweel, 43 N. E. 277; McElroy v. British Am. Assurance Co., 94 Fed. 990; Dietz v. Providence Washington Ins. Co., 8 S. E. 616; North British & Mercantile Ins. Co., v. Steiger, 16 N. E. 95; Newman v. Association, 40 N. W. 87; Lumberman's Mutual Ins. Co. of Chicago v. Bell, 45 N. E. 130.

Notice to a subagent while engaged in soliciting, of any fact material to the risk, is notice to the company and binds it the same as if given directly to the agent himself. Carpenter v. German-Amer. Ins. Co., 31 N. E. 1015; Goode v. Georgia Home Ins. Co., 23 S. E. 744; Steele v. German Ins. Co. of Freeport, 53 N. W. 514; Arff v. Star Fire Ins. Co., 25 N. E. 1073; Bennett v. Council

Bluffs Ins. Co., 31 N. W. 948; Phoenix Ins. Co. v. Ward, 26 S. W. 763; Schoeneman v. Western etc. Ins. Co., 20 N. W. 284.

An insurance company may waive the payment of the premium at the time it is due. If it is afterwards paid after loss occurs and is retained and appropriated by the company and the policy delivered, it will be a waiver of the terms of the policy and the company cannot retain the premium and refuse to pay the loss. Schoeneman v. Western etc. Ins. Co., *supra*; Lobee v. Standard Live Stock Ins. Co., 33 N. Y. S. 657; Smith v. St. Paul Fire & Marine Ins. Co., 13 N. W. 355; Bloom v. State Ins. Co., 62 N. W. 810.

Acceptance of premium after loss has occurred is a waiver of the right to declare a forfeiture of the policy and not a mere act of revival. Joliffe v. Madison Mutual Ins. Co., 39 Wis. 111; Johnson v. Dak. Fire & Marine Ins. Co., 1 N. D. 167, 45 N. W. 799; Cotten v. Fidelity & Casualty Co., 41 Fed. 506; Oshkosh Gas Light Co. v. Germania Fire Ins. Co., 37 N. W. 819; Phoenix Life Ins. Co. v. Raddin, 120 U. S. 183, 7 Sup. Ct. Rep. 500, 30 L. Ed. 644; Wood on Fire Insurance, 50-51; Schoeneman v. Western etc. Ins. Co., *supra*; Weiberg v. Minnesota Scandinavian Relief Assn., 76 N. W. 37; Erdmann v. Mutual Ins. Co., 44 Wis. 376; McQuillan v. Mut. Reserve Fund Assn., 87 N. W. 1069; Gray v. National Benefit Assn., 11 N. E. 477.

YOUNG, C. J. This case has been tried twice in the district court. On both trials the plaintiff had a verdict, and each was followed by the denial of a motion for a new trial. This is the second appeal to this court. The report of the former appeal will be found in 11 N. D. 274, 91 N. W. 75. The action is upon an insurance policy for \$2,000 issued by the defendant upon the life of plaintiff's husband. Defendant bases its denial of liability upon the following stipulation in the policy, "This policy shall not take effect unless the first premium is actually paid while the assured is in good health," and alleges that the assured was not in good health when the first premium was paid, but, on the contrary, was then suffering from a disease from which he subsequently died. Upon the former appeal we reversed the order denying the motion for a new trial upon the ground of prejudicial errors in the admission of testimony which was offered by plaintiff to show waiver of the above condition. The present order must be reversed for the same reason.

The following statement of facts from the former opinion will aid in a proper understanding of the questions involved in this appeal: On the 23d of August, 1900, the plaintiff's husband, Horace S. Thompson, made an application for a policy of life insurance in the defendant company for the sum of \$2,000. On the 4th of September following, the policy was issued pursuant to such application, and sent to the local agent of the company at Valley City, N. D., and was received by him on September 11th. On the 15th of September the policy was delivered to one Tracy, for Thompson, upon payment of the premium, amounting to the sum of \$53.24. The policy was payable to the plaintiff. The assured died on September 28, 1900. Proofs of death were made on October 15, 1900. Payment under the policy was refused by the company, and this suit followed. It appears that on or about September 1st the assured was injured in a runaway accident resulting in a broken rib. A doctor treated him for such injury by applying bandages on two occasions when the assured visited his office. The assured made a trip to St. Paul between the dates of these two treatments, and remained there three or four days, returning on September 10th. On September 13th he was suffering from a dull headache, and was in bed a part of the time. On the evening of that day he made arrangements with Tracy to pay the insurance premium and procure his policy on the following Saturday, in case his health or the weather prevented his going to Valley City, as he then intended to do. He did not go to Valley City, and Mr. Tracy did as requested. On Sunday night his headache became very severe, and a doctor was sent for in the morning of Monday, the 17th, and visited him on that day, and thereafter had the assured under his care, and visited him at various times until his death, on the 28th. The agent of the defendant received the premium on the 15th of September, and sent it to the St. Paul office; and in due course of business it was received at the main office of the company, at Hartford, Conn., on October 12, 1900. The policy bears date September 4, 1900, but contains no acknowledgment of the payment of the premium.

The defendant contends that the evidence is insufficient to support the verdict, in this: That it conclusively shows that the assured was not in good health when the first premium was paid, and wholly fails to show that the condition in the policy above set out was waived, and assigns a large number of errors upon the admission

of testimony which was offered for the purpose of establishing a waiver. On the other hand, counsel for plaintiff contend that there is evidence in the record from which the jury was warranted in finding either that the insured was in good health, or that the condition was waived. There is no controversy as to the validity or effect of the condition in question. It was made a part of the contract by the parties, and, in terms, it makes the liability of the defendant depend upon an extrinsic fact, namely, the good health of the deceased when the first premium was paid. It will be noted that this provision is not a mere representation that the assured was in good health, or a statement of his belief or opinion that such was the fact. It is equivalent to a warranty of the fact, and is a fact agreed upon by the parties as a condition precedent to the attaching of defendant's liability. Apparent good health was not sufficient. The fact that a disease may be latent and unknown does not relieve the insured from his stipulation. It is the fact of good health which governs. The effect of such a stipulation is well set forth in *Powers v. The Northeastern Mutual Life Ass'n*, 50 Vt. 637. In that case the assured had warranted in his application, which by stipulation was made the basis of his policy, that he did not have diseases of the heart. The jury found that the assured had a disease of the heart at the time when he made his application, but did not know it, and might not be reasonably expected to know it. It was held that, as the assured had thus agreed that the company should not assume the risk of that disease it was not liable. The court said: "A policy of insurance is to be construed like other contracts *inter partes*. * * * In this case the parties have mutually agreed upon the terms of their contract, the language embodying it is plain, and its scope and effect are neither difficult nor uncertain. By the terms of the policy and application * * * the parties agreed that the truthfulness of the applicant's answer to the questions propounded should be the basis upon which the validity of the policy should stand—if true, the policy should be a valid contract; if untrue, the policy should have no force as a contract. The applicant assumed the whole risk of the consequences if his answers turned out untrue. The existence of disease in an applicant for life insurance is the presence of the very peril the company insures against. It is like insuring a building already on fire. The question as to the health of the applicant is a preliminary one—to ascertain if he is an insurable subject. The force of the

stipulations and conditions above recited is to create a contract obligation on the part of the applicant that he was free from the heart disease. He agreed that such peril and risk would not be encountered by issuing the policy, and, if such peril did exist, the contract should not be operative. Proof of the existence of the heart disease established a breach of the underlying contract upon which the policy rested. It is wholly immaterial whether the applicant knew of the existence of the disease, because he agreed absolutely that it did not exist. Nor is it any answer to say that the question is a scientific one, and a layman might easily be deceived into a false answer. Scientific or simple, the applicant took the risk of the answer. If he had answered that he had no knowledge that the disease existed, the finding of the jury might affect the result." See, also, *Tobin v. Modern Woodmen* (Mich.), 85 Wis. 622; *Baumgart v. Modern Woodmen*, 85 Wis. 546, 55 N. W. 713; *Boyle v. Northwestern M. R. Ass'n*, 95 Wis. 312, 70 N. W. 351; *Insurance Co. v. Pyle*, 44 Ohio St. 19, 4 N. E. 465, 58 Am. Rep. 781; *Volker v. Metropolitan Life Ins. Co.* (Com. Pl.), 21 N. Y. Supp. 456; *Miles v. Connecticut M. L. Ins. Co.*, 3 Gray, 580; *Aetna Life Ins. Co. v. France*, 91 U. S. 510, 23 L. Ed. 401; *Jeffries v. Insurance Co.*, 22 Wall. 47, 22 L. Ed. 833. See, also, numerous cases cited in note to *Fidelity Mutual Life Ass'n v. Jeffries* (107 Fed. 402, 46 C. C. A. 377) reported in 53 L. R. A. 193.

The order refusing a new trial must be reversed for prejudicial errors in the admission of testimony in support of the alleged estoppel. The plaintiff claims that Secor, the defendant's agent, knew the condition of the assured's health when he delivered the policy to Tracy; that his knowledge is imputed to the company; and that the acceptance and retention of the premium under these circumstances estops the defendant from urging that the assured was not then in good health. Secor's authority was that of a soliciting agent, and extended to taking and forwarding applications, delivering policies and collecting first premiums. It does not appear that he had authority to pass upon the physical condition of an applicant, or that it was a part of his duties to furnish the information in reference thereto upon which his principal acted in accepting or declining risks. That information was provided by the written application and the report of the medical examiner, independent of the soliciting agent. The view we have taken of

the evidence renders it unnecessary to determine whether the scope of Secor's agency was such that his knowledge was the knowledge of his principal. For, assuming that to be the case, we are clear that there is an entire absence of evidence upon which to found an estoppel.

On the former appeal it was urged that the defendant was estopped because it had retained the premium. This we denied for the reason that it did not appear that it was retained with knowledge that the assured was not in good health when the premium was paid. Upon the facts then presented, we said: "It is beyond dispute that neither the agent of the company at Valley City, nor any of the officers of the company, had any knowledge of the insured's health on September 15th, except such as was communicated to said agent or officers of the company by the application for insurance of August 23d. Neither the agent nor the company had any knowledge of the broken rib or of any sickness of the insured when the premium was paid on September 15th. * * * The authorities uniformly hold that the acceptance of the premium under such circumstances does not constitute a waiver of a forfeiture or other defense, and the same may be pleaded in avoidance of all claims under the policy when suit is brought upon it. *Joyce on Insurance*, par. 1369; *Insurance Co. v. Wolff*, 95 U. S. 326, 24 L. Ed. 387; *Bingler v. Insurance Co. (Kan. App.)*, 61 Pac. 673." We further held that the retention of the premium by the company after the receipt of proofs of death, showing the cause of death, did not operate as an estoppel; the rights of the parties having been fixed by the death of the assured. Our conclusion upon that point is re-enforced by the recent case of *Stringham v. Mutual Life Ins. Co. (Or.)* 75 Pac. 822.

On the present trial evidence was offered tending to show that, before the premium was paid, Secor had heard that the assured had been in a runaway accident, and had been dragged upon the ground and bruised. Over the objection of defendant's counsel, he was permitted to testify on behalf of plaintiff that he made no effort to inquire into the health of the assured when the policy was delivered, that he had heard of the broken rib when he sent the premium to the company, and that he did not offer to return the premium to the assured, or to any one for him. The plaintiff also testified, over objection, that the defendant had not offered to return "the amount of the premium paid for and on account of the

policy in question, to wit, \$53.24." Other evidence of a similar nature was received over like objection. At the close of the case, counsel for the defendant moved to strike out Secor's evidence "upon the ground that it is inadmissible as evidence of any waiver; also the testimony of the plaintiff that has reference to the non-return of the premiums paid, for the same reason." The motion was overruled. In our opinion, it should have been granted. It is undisputed that the assured was in good health when he made his application on August 23d. It is agreed that the injuries received in the runaway accident were not of such serious character that it can be said that by reason of such injuries alone he was not in good health on September 15th. The evidence tends very strongly to show that his death on September 28th was caused by a disease termed "empyema," and the sole ground urged to establish the fact that the assured was not in good health on September 15th is that he had this disease when the policy was delivered. Assuming that the knowledge of Secor is to be imputed to the defendant, does this, coupled with the receipt and retention of the premium, estop it from relying upon this condition of the policy? Clearly not, for greater knowledge than he had cannot be imputed. Secor did not know, and no one else knew, that the assured had empyema; and it was the presence of that disease alone, if it was present, which avoided the policy. The disease, if present, was latent. The attending physician did not discover it until the day of his death. The company was not apprised of the cause of his death until the proofs of death disclosed it. Not only was Secor ignorant of the fact that the assured had the disease in question or any other disease, but was informed by the attending physician, after inquiry, that there was nothing the matter with the assured. Under these circumstances, had Secor communicated all that he knew, and all that others seem to have known, to the company, it would not have disclosed any ground for avoiding the policy, for it was only when it was discovered, on the day of his death, that the assured had empyema, that it was known that he was not in good health when the premium was paid. So far as outward appearances went, the assured seemed to be suffering from merely a temporary indisposition. There was, then, no knowledge on the part of Secor or the company of the fact which gave it the right to avoid the policy, and the defendant was under no obligation to make inquiry as to that fact. The obligation was the reverse. The defendant had,

after an examination, found the assured in good health on August 23d, and it had a right to assume that this condition still existed when the policy was delivered. It was the duty of the assured to make disclosure, and he made none. It is well settled that the obligation rests upon an applicant for life insurance to disclose such changes in his physical condition as occur pending the negotiation as would influence the judgment of the company as to the advisability of accepting the risk. *May on Insurance*, sections 190, 191; *Piedmont & Arlington Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. Ed. 610; *Whitley v. Piedmont & Arlington Ins. Co.*, 71 N. C. 480. Such information as the agent had came from general report, and not from the assured or any one representing him. The record discloses neither word nor act on the part of the agent or the defendant which would induce a belief in the assured that the policy was binding without regard to the condition of his health, while it fairly appears, on the contrary, that he obtained a delivery of the policy without disclosing the facts. The present record brings the case within the rule followed in the former appeal, viz., that without knowledge there can be no estoppel. The evidence offered to support the estoppel was wholly insufficient, and it should have been stricken out. That its retention and submission to the jury was prejudicial is apparent, and for this reason the motion for a new trial should have been granted. The defendant did not ask for judgment notwithstanding the verdict. We have no reason, therefore, for expressing an opinion upon his contention that the evidence shows conclusively that the assured was not in good health. A new trial must be granted for prejudicial errors in refusing to strike out the evidence relating to the alleged estoppel, and no further relief could be given if we sustain his contention as to the conclusive character of the evidence that the assured was not in good health.

The district court is directed to vacate the order appealed from, and to enter an order granting a new trial. All concur.

(101 N. W. 900.)

GEORGE GUSSNER v. STEPHEN A. HAWKS.

Opinion filed November 23, 1904.

Agent — Sale of Principal's Property.

1. Personal property, bought by an agent for his principal, with the principal's money, cannot be sold to a third person, although an

innocent purchaser, so as to convey title thereto as against the principal, unless such principal has estopped himself by his act or conduct from asserting his ownership of such property.

Depositions.

2. A party to an action has no right to read excerpts or isolated portions of a deposition on the trial of an action.

Appeal from District Court, Emmons county, *Winchester, J.*

Action by George Gussner against Stephen A. Hawks. Judgment for defendant, and plaintiff appeals.

Reversed.

F. H. Register and Newton & Dullam, for appellant.

A portion of a deposition may be read. *VanHorn v. Smith*, 12 N. W. 789. When in the taking of a deposition of a witness the adverse party has appeared and cross-examined, he is entitled to the benefit of the deposition, and may read such portions of it as he chooses without being compelled to read the whole. *Converse v. Meyer*, 14 Neb. 190, 15 N. W. 340; *Southwark Ins. Co. v. Knight*, 6 Whar. Pa. 327; *Geilaty v. Lowry*, 6 Bosw. 13 (N. Y.): *Calhoun v. Hayes*, 8 Watts & S. 127.

The defendant on moving for a directed verdict admits in favor of the plaintiff every fact which the evidence submitted tended to show and all proper inferences therefrom of every fact and inference which the jury might find from the evidence submitted upon which the motion is based. *Bohl v. City of Dell Rapids*, 15 S. D. 619, 91 N. W. 315; *Marshall v. Harney P. T. & M. M. Co.* 1 S. D. 350, 47 N. W. 290; *Sanford v. Duluth & Dak. Elevator Co.* 2 N. D. 6, 48 N. W. 434; *Warnken v. Langdon M. Co.*, 8 N. D. 243, 77 N. W. 1000.

Extraneous evidence is admissible to ascertain the circumstances under which a writing was made, and the subject matter to be regulated by it. *Wilson v. Troup*, 2 Cowen 229; *Summer v. Williams*, 8 Mass. 214; *Fowle v. Bigelow*, 10 Mass. 384; *Whallon v. Kaufman*, 19 Johns. 104; *Prairie School Twp. v. Haseleau*, 3 N. D. 328, 55 N. W. 938; *Morris v. Railway Co.* 21 Minn. 91; *Burke v. Ray*, 41 N. W. 240.

Where evidence is received without objection at the trial, no objection can be made on appeal. *Warder et al. v. Ingli*, 46 N. W. 181; *Goode v. Smith* 13 Cal. 81; *Janson v. Brooks*, 29 Cal. 214; *Becker v. Becker*, 45 Ia. 239; *Hayne New Trials and Appeals*, 398.

An agent or trustee may, even though wrongfully as to his principal or beneficiary, dispose of his principal's property to a stranger acting in good faith and without knowledge of the facts, or of facts imposing inquiry, and for value. But such stranger must be such in fact to the agent's duplicity, and act in entire good faith, or he becomes a confederate in the wrong and cannot be protected, and as to the one not acting in good faith, as the trust property may be traced through any changes in whomsoever hands it may have come, he having notice, or into whatever form it may have been changed, and recover. *Dow et al. v. Berry et al.*, 18 Fed. 121; *May v. LeClaire*, 78 U. S. 217, 20 L. Ed. 50; 1 Am. & Eng. Enc. Law, 427; 27 Am. & Eng. Enc. Law, 250; 1 Am. & Eng. Enc. Law, (2d Ed.) 1172.

The doctrine is applied to implied as well as express trusts, to personal property as well as real. 12 Fed. 124.

Under proper instructions, the question of ownership and right to possession of the cattle in question, and of Hawk's knowledge of the plaintiff's interests and rights therein, should have been submitted to the jury. The questions of fact could not be decided adversely to the plaintiff by directing a verdict for the defendant. *Drakely v. Dregg*, 75 U. S. 242, 19 L. Ed. 409; *Hickman v. Jones*, 76 U. S. 197, 19 L. Ed. 551; *Barney v. Schneider*, 76 U. S. 248, 19 L. Ed. 648; *Kelsey v. Oil Co.*, 45 N. Y. 505; *Way v. R. R. Co.*, 35 Ia. 585.

Where the thing bailed is sold by the bailee, such act determines, ipso facto, the bailee's right of possession, and raises the right of the bailor to immediate possession, and he may maintain trespass, trover or replevin. *Swift v. Mosley*, 10 Vt. 208; *Briggs v. Oakes*, 26 Vt. 138; *Briggs v. Bennett*, 26 Vt. 146.

H. A. Armstrong and Allen & Cochrane, for respondent.

The intention of the parties reduced to writing must be obtained therefrom alone if possible. *Harris v. State*, 9 S. D. 453, 69 N. W. 825.

Under an executory contract, title cannot pass until delivery was made and all terms of said contract complied with. *Nichols & Shepard Co. v. Paulson*, 6 N. D. 400; 71 N. W. 136; *Cook v. Logan*, 7 Iowa, 141; 1 Par. on Con. 441; Story on Sales, section 286; *Chitty on Con.* (10th Am. Ed.) 396; *Ober v. Carson*, 62 Mo. 209; *Addison on Con.* (2d Am. Ed.) 225.

MORGAN, J. The plaintiff brought this action to recover possession of seventy head of cattle, of which he claims to be the absolute owner. The defendant, by his answer, denies the plaintiff's ownership, and alleges ownership in himself. Upon the conclusion of the taking of testimony on behalf of the plaintiff the court directed a verdict for the defendant upon his motion. After the denial of a motion for a new trial judgment of dismissal of the action was entered, and the plaintiff has appealed from such judgment. The assignments of error relate to the exclusion of offered testimony and to the granting of the motion to direct a verdict in defendant's favor. The facts out of which this action grew are as follows: On May 28, 1900, the plaintiff and one Robinson entered into a contract, under which Robinson was to buy some cattle for plaintiff. The evidence of said contract, in part, is the following memorandum, entered into at that time, and known as "Exhibit A":

"Bismarck, North Dakota, May 28, 1900.

"\$900. Received of George Gussner the sum of nine hundred dollars as part payment on sixty-five or seventy yearling steers, good color, to cut out Jerseys and Holsteins. Cattle to be good grade; cost to be \$17 or \$18, delivered at Braddock, N. D.

"I. H. Robinson."

Soon after the payment to him of said \$900, Robinson went to Canada to buy the cattle. While in Canada, he wrote Gussner, and advised him of the progress he was making in buying the cattle. At Minneapolis, on July 2d, he telegraphed Gussner that he would be at Braddock, N. D., on the following Thursday. Gussner met him at Braddock on that day to take charge of the cattle. The freight upon the cattle had not been paid, and Robinson told Gussner that the freight must be paid. Gussner tried to pay his pro rata share of it, but the agent would not receive what was due on the Gussner cattle, but demanded the payment of the freight on the whole shipment, which included some fifty-seven head of other cattle, which Robinson had bought for his brother-in-law. Robinson also insisted that Gussner should pay the freight on these other cattle. Robinson finally refused to deliver the cattle to Gussner unless he would pay \$21 per head for them. While these differences were being talked over and settled, plaintiff came to Bismarck and remained several days. During this time Robinson sold and delivered the steers to the defendant, and plaintiff immediately brought this action to recover their possession. Prior to bringing this action plaintiff

tendered to Robinson \$360, being the amount due Robinson from plaintiff upon the purchase price of seventy head of cattle at \$18 per head.

This tender was refused.

Upon these facts it is insisted that the direction of a verdict was erroneous. In this contention we concur. Exhibit A is not definite as to the terms of the agreement between plaintiff and Robinson. It fairly appears from it and other evidence that Robinson was plaintiff's agent to purchase cattle for him with plaintiff's money, and that the money was intrusted to Robinson for that purpose, and that Robinson did actually purchase cattle for plaintiff with that money, and had the cattle at Braddock for the purpose of turning them over to the plaintiff as his property. The cattle were therefore held by Robinson in trust for the plaintiff, who was entitled to their possession upon payment to Robinson of any balance that might be due to him under their purchase price, pursuant to the contract between him and the plaintiff. Upon such payment of such sum plaintiff would become the absolute owner of the cattle. He could not be divested of such ownership without his consent, unless by his conduct he had estopped himself to assert his ownership thereof as against an innocent purchaser. Permitting Robinson to have the possession of the cattle for the purpose of delivery to plaintiff would not alone constitute an estoppel; nor would his failure to accept the property upon terms imposed by Robinson alone constitute such estoppel. The most that Robinson could insist on would be to hold the property until his lien for advances on the purchase of the property, if any, had been paid. Under the contract he could not dispose of the property by sale. The rule is stated to be as follows: "And if the trust property be other than money, the disposal thereof without authority may be disavowed and set aside by the owner, even if it has found its way into the hands of an innocent purchaser. And so, if the agent purchase property with the funds of his principal, it may be followed into the hands of a third person, though innocent, having no notice of the right of the principal, who purchases for value; for such third person can get no better title than has he from whom the third person derives it." Reinhard on Agency, section 388. See, also, *Gilman Oil Co. v. Norton*, 89 Iowa, 434, 56 N. W. 663, 48 Am. St. Rep. 400; *Stevenson v. Kyle*, 42 W. Va. 229, 24 S. E. 886, 57 Am. St. Rep. 854; *Mechem*

on Agency, section 437; Velsian v. Lewis, 15 Or. 539, 16 Pac. 631, and note in 3 Am. St. Rep. 184.

Plaintiff also assigns error on the court's refusal to permit a portion of Robinson's deposition to be read to the jury. The deposition was taken on defendant's application, and plaintiff appeared at the taking thereof, and cross-examined the witness. Plaintiff offered Robinson's answers to three questions in the deposition as given on cross-examination in evidence, and the offer was rejected. There was no error in this ruling. The question was settled by this court in Bank v. Elevator Co., 11 N. D. 280, 91 N. W. 436. It was there held that a party cannot introduce mere excerpts or isolated parts of a deposition. See authorities there collected; also 13 Cyc. 983, and cases cited.

The judgment of the district court is reversed, and the case remanded for further proceedings. All concur.

(101 N. W. 898.)

JOHN M. CARROLL V. THE TOWNSHIP OF RYE, COUNTY OF GRAND FORKS.

Opinion filed November 23, 1904.

Surface Water — Improvement of Highways — Liabilities of Township.

1. A township is not liable for the loss suffered by a landowner by the increased flow of surface water upon his land, resulting solely from the improvement of a highway in the ordinary manner without negligence.

Same.

2. Whether or not any liability would ensue if the surface water had been diverted from a definite channel is not decided.

Appeal from District Court, Grand Forks county; *Fisk, J.*

Action by John M. Carroll against the township of Rye. Judgment for defendant, and plaintiff appeals.

Affirmed.

William H. Standish, for appellant.

In all states, having either a common law or civil law rule as to surface water damage, the general rule of negligence prevails, that in the construction of any public improvement, it must be upon a plan that will do no unnecessary damage to those who are protected before the improvement is made. That in such states,

roads cannot be dug through ridges, and the ridges banked higher for the purpose of carrying surface water through the ridge to lands upon the other side of it, and to be made without culverts at suitable distances and places to aid and permit surface waters to cross through the road and take them in their natural course. And where roads are thus built carelessly or purposely in violation of these provisions and to divert surface waters to lands that did not receive them before, to the damage of parties, the township is liable, whether it had any lawful purpose in view or not. There is no common law rule of surface water damages in any state having the constitutional provision of Article 14 of the Constitution of North Dakota, that no person shall be damaged by a public corporation without compensation. The defendant township had no right to construct a ditch or dike through a ridge without suitable culverts to keep the surface water in its natural course, and to divert it in large quantities from going into the defendant township and on to the farms therein to the damage of their owners. *Patoka Township v. Hopkins*, 30 N. E. 896; *Davis v. City of Crawfordsville*, 21 N. E. 449; *Weddell v. Hapner*, 24 N. E. 368; *Davis v. Commissioners of Highways*, 33 N. E. 58; *Young v. Commissioners of Highways*, 25 N. E. 689; *Anderson v. Henderson*, 16 N. E. 232; *Cassidy v. Old Colony R. R. Co.*, 5 N. E. 142; *Bates v. Inhabitants of Westborough*, 23 N. E. 1070; *Rychliche v. City of St. Louis*, 11 S. W. 1001; *Gembler v. Echterhoff*, 57 S. W. 313; *Grimstead v. Sanders et al.*, 56 S. W. 665; *Rice v. Norfolk & C. R. Co.*, 41 S. E. 1031; *Farkas et al. v. Towns et al.*, 29 S. E. 700; *Baltimore Breweries' Company v. Ranstead*, 28 Atl. 273; *Eshelman v. Twp. of Martic*, 25 Atl. 178; *Glass v. Fritz* 23 Atl. 1050; *Torrey v. City of Scranton*, 19 Atl. 351; *Davidheiser v. Rhodes*, 19 Atl. 400; *Whipple v. Village of Fair Haven*, 21 Atl. 533; *Miller v. Mayor of Morristown*, 20 Atl. 61; *Slack v. Lawrence*, 19 Atl. 663; *Field v. Town of West Orange*, 2 Atl. 236; *John v. City of Parkersburg*, 16 W. Va. 702, 37 Am. Reps. 779; *Jutte v. Hughes*, 67 N. Y. 267; *Noyes v. Casselman*, 70 Pac. 61; *Sanguinetti v. Pock*, 69 Pac. 98; *Gray v. McWilliams*, 32 Pac. 976; *Los Angeles Creamery Association v. City of Los Angeles*, 37 Pac. 375; *Cushing v. Piries*, 57 Pac. 572; *Rudel v. Los Angeles County*, 50 Pac. 400; *Finkbinder v. Ernst*, 85 N. W. 1127; *Leidlein v. Meyer*, 55 N. W. 367; *Yerex v. Eineder*, 48 N. W. 875; *Gregory v. Bush*, 31 N. W. 90; *Andrews v. Village of Steele City*, 89 N. W. 739; *Fremont, E. & M. V.*

R. Co. v. Marley, 40 N. W. 948; Lincoln Street Ry. Co. v. Adams, 60 N. W. 83; Bonderson v. Burlington & M. R. R. Co., 61 N. W. 721; Jacobson v. Van Boening, 66 N. W. 993; Shuster v. Albrecht, 73 N. W. 990; Oftelli v. Town of Hammond, 80 N. W. 1123.

Bosard & Bosard, for respondent.

The roads graded in the defendant township were necessary in order that the owners of the land in that township could use it by having good roads on which to travel and haul their crops to market. In making such improvements, it was necessary to excavate along the sides of the road to get earth to build it; there was no more excavation than was necessary, and if the surface waters were thereby diverted to some extent, or there was more of it flowed in a certain direction than before, and on or over the lands of others and they were thereby damaged, it is a *damnum absque injuria*. *Bolwsby v. Speer*, 2 Vroom, 351, 86 Am. Dec. 216; *Gannon v. Hargaden*, 10 Allen, 106, 87 Am. Dec. 625; *Luther v. Winnesimmet Co.*, 9 Cush. 171; *Flagg v. Worcester*, 13 Gray, 601; *Dickinson v. Worcester*, 7 Allen, 19; *Franklin v. Fisk*, 13 Allen, 211, 90 Am. Dec. 194; *A. T. & Santa Fe R. R. Co. v. Hammer*, 22 Kan. 763, 31 Am. Rep. 216; *Cairo & V. R. R. Co. v. Stevens*, 73 Ind. 273, 28 Am. Rep. 139; *Jordan v. St. P., M. & M. R. Co.*, 6 L. R. A. 573; *Lee v. Minneapolis*, 22 Minn. 13; *O'Brien v. St. Paul*, 25 Minn. 331; *Henderson v. City of Minneapolis*, 32 Minn. 318, 20 N. W. 322; *Rowe v. St. Paul, M. & M. R. Co.*, 43 N. W. 76; *Johnson v. Chicago, St. P., M. & O. R. Co.*, 14 L. R. A. 495; *Waters v. Bay View*, 61 Wis. 642, 21 N. W. 811; *Allen v. City of Chippewa Falls*, 52 Wis. 430; 28 Am. Rep. 748, 9 N. W. 284; *Hoyt v. City of Hudson*, 27 Wis. 656, 9 Am. Rep. 473; *Lessard v. Stram*, 62 Wis. 112, 51 Am. Rep. 715, 22 N. W. 284; *Hamlin v. Chicago & N. W. R. Co.*, 61 Wis. 515, 21 N. W. 623; *O'Connor v. Fond du Lac A. P. R. Co.*, 52 Wis. 526, 38 Am. Rep. 754, 9 N. W. 287; *Eulrich v. Richter*, 37 Wis. 226; *Ramsdale v. Foote*, 55 Wis. 560, 13 N. W. 557; *Waters v. Village of Bay View*, 21 N. W. 811.

The rule is the same with respect to an adjoining land owner changing the surface of his land, or placing obstructions or embankments thereon, to change the course of surface water thereon. *Lessard v. Stram*, 22 N. W. 284; *Hamlin v. Chicago & N. W. R. Co.*, 61 Wis. 515, 21 N. W. 623; *O'Connor v. Fond du Lac, etc., Ry. Co.*, 52 Wis. 526, 9 N. W. 287; *Eulrich v. Richter*, 337 Wis. 226;

Fryer v. Warne, 29 Wis. 511; Ramsdale v. Foote, 55 Wis. 560; 13 N. W. 557.

The owner of lands is not bound to provide drains or waterways to prevent the accumulation of surface water upon adjacent lands, the natural flow of which is interrupted by changes in the surface of his own lands caused by improvements thereon. O'Brien v. City of St. Paul, 25 Minn. 336; Hoganon v. St. P. M. & M. Ry. Co., 31 Minn. 226, 17 N. W. 374; Township of Blakely v. Devine, 36 Minn. 53, 29 N. W. 342; Pye v. City of Mankato, 36 Minn. 373, 31 N. W. 863; Alden v. City of Minneapolis, 24 Minn. 262; Hoyt v. City of Hudson, 27 Wis. 656; O'Connor v. Fond du Lac, etc., Ry. Co., 52 Wis. 530, 9 N. W. 287; Hamlin v. Chicago & N. W. R. Co., 61 Wis. 515, 21 N. W. 623; Kansas City E. Ry. Co. v. Riley, 33 Kan. 374, 6 Pac. 581; Abbott v. Railroad Co., 83 Mo. 285; Stocker v. Nemaha Co. 93 N. W. 721.

ENGERUD, J. Plaintiff seeks by this action to recover from the defendant township damages suffered from the flooding of his land, caused by certain drains, ditches, roads and dikes which he alleges had been constructed and maintained by the township in such a way as to gather the surface water from distant territory and empty it upon his lands, upon which it would not naturally have come. The answer was, in effect, a general denial. The trial was before a jury, and resulted in a verdict for the plaintiff after the denial of defendant's motion for a directed verdict. The defendant thereupon moved for judgment in its favor notwithstanding the verdict, and the trial court granted the motion. The sole question on this appeal is whether the evidence justified that ruling.

Plaintiff owns and occupies the northeast quarter of section 18 in Falconer township, in Grand Forks county. That township lies next east of the defendant, Rye township. The surface of both townships, like nearly all Red River valley lands, is an apparently level prairie. There is a general slope towards the north and east, but it is so slight that it is not noticeable to the eye. In 1895 and 1896 the defendant township graded up the section line road from the east line of the townships between sections 13 and 24, and extending west a distance of four miles. This road is known as the "center road." Three years later it graded up the highway on the section line next south of the center road. This grade also extends from the east

line of the township westward a distance of four miles. It may be styled the "south road." Both highways were constructed in the usual way. The earth was taken from both sides of the section line, and piled up in the middle, so as to make the roadbed about eight feet wide at the top, and elevated about a foot or two above the prairie, leaving ditches on each side five or six feet wide and a foot or two in depth. Both these grades connect at the township line with like graded highways in Falconer township, so that on each section line there is a continuous graded road across both townships. The Great Northern railroad track runs diagonally through Falconer township from southeast to northwest, and crosses the southwest part of plaintiff's farm. The railroad crosses the south road one and a half miles east of the township line, and crosses the center road at the southeast corner of section 18. The roadbed for the railroad was made in the same way as the highways. There is a culvert under the railroad on plaintiff's farm. It is claimed by the plaintiff that the highway grades in Rye township obstruct the natural flow of the surface water to the north, and that the ditches on the south side of the respective highways conduct the water east to the railroad ditch, which carries it north to the culvert, whence it spreads out over plaintiff's farm, causing the injuries complained of. Plaintiff's proof tends to show that his farm has been subject to damage from the increased flow of surface water since the construction of the grades in question in Rye township, and claims that such damage has been proximately caused by the construction of said highways. This claim is strenuously denied by the defendant. In view of our decision on other points in the case, it is not necessary to decide this disputed question. For the purposes of this case we may assume that the plaintiff has been damaged, and that such damage is the proximate result of defendant's acts.

In this case, as in every action for the recovery of damages, the first inquiry must be as to whether the defendant has been guilty of any actionable wrong, either of commission or omission. The two essential primary elements of a cause of action in tort are wrongful conduct by one party followed by damages to the other; consequently mere proof of damage suffered by plaintiff, even though proximately caused by defendant's acts, does not establish a cause of action for the recovery of such damages, unless it is proved that the defendant's conduct is a violation of some right of the plaintiff which the law will recognize.

The appellant claims that the township has obstructed the flow of the surface water and diverted it from its natural channels, and that the so-called "civil-law rule" with respect to surface water should be applied. The respondent asserts that the rule known as the "common-enemy rule" adopted in Massachusetts and some other states, is the true rule, but further claims that the facts in the case conclusively show that plaintiff has no cause of action under any rule. Inasmuch as the court must sustain respondent's contention as to the facts, we are compelled to forbear taking any part in the interesting controversy which has engaged the courts for many years, as to which of the conflicting rules is the one which truly voices the common law. Under the "common-enemy rule," which is often called the "common-law rule," neither the upper nor lower proprietor can claim any right of drainage for surface water through mere natural surface channels that do not come within the technical definition of a water course. *Gannon v. Hargadon*, 10 Allen, 106, 87 Am. Dec. 625; *Bowlsby v. Spear*, 31 N. J. Law, 352, 86 Am. Dec. 216; *R. R. Co. v. Hammer*, 22 Kan. 763, 31 Am. Rep. 216; *R. R. Co. v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139; *Allen v. City*, 52 Wis. 430, 9 N. W. 284, 38 Am. Rep. 748; *Jordan v. R. R. Co.*, 42 Minn. 172, 43 N. W. 849, 6 L. R. A. 573. It is clear that under this rule the plaintiff could have no cause of action. The so-called "civil-law rule" is, in effect, that natural depressions and channels which afford drainage for surface water cannot be obstructed, or the waters diverted from them, to the damage of others. *Gray v. McWilliams*, 98 Cal. 157, 32 Pac. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163; *Gormley v. Sanford*, 52 Ill. 158; *Boyd v. Conklin*, 54 Mich. 583, 20 N. W. 595, 52 Am. Rep. 831; *Railway Co. v. Helsley*, 62 Tex. 593; *Tootle v. Clifton*, 22 Ohio St. 247, 10 Am. Rep. 732; *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147; *Barrow v. Landry*, 15 La. Ann. 681, 77 Am. Dec. 199; *Kauffman v. Griesemer*, 26 Pa. 407, 67 Am. Dec. 437.

It will be seen that these conflicting rules grew out of a difference of opinion as to one question, namely, whether or not any right of drainage existed into or through a mere surface channel which was not a technical water course. The courts which held the affirmative followed a more or less modified form of the rule of the civil law dealing with the subject. Those who followed the negative followed the common-enemy rule. *Farnham on Waters*, section 889d et seq. It is a necessary corollary of either of the rules men-

tioned that there is no right anywhere to the continued flow of surface water which has not taken a definite course, but which spreads out over the surface of the ground. It will be seen, therefore, that neither rule has any application unless some channel for surface water has been obstructed or its waters diverted. In this case plaintiff's evidence conclusively shows that there has been no obstruction of any channel or diversion of waters therefrom. The only claim made as to any such a channel is that there is an irregular depression, which some of the witnesses call a "slough," which is crossed by the center road at a point about 400 rods west of the township line between Rye and Falconer townships, and that east of this slough there is a ridge near the township line, also crossed by the center road. Plaintiff's evidence tends to show that this ridge is a watershed which kept the surface water in that part of Rye township away from Falconer township, and turned it towards the slough, which in turn carried it northward, so that it never reached plaintiff's farm. It is alleged in the complaint, and asserted in argument, that the highway embankment stops the water at the slough, and the highway ditch carries it through the ridge into Falconer township. The evidence furnished by plaintiff's own witnesses, however, conclusively disproves this allegation. Their testimony shows that the highway ditches are substantially uniform in depth, and were not dug deeper through the ridge than west of it. The embankment in like manner is no higher above the prairie in the depression than it is on the ridge. The plaintiff employed a surveyor to make measurements to ascertain the relative elevation of different points along the center road. A plat showing the result of his work was in evidence. It shows that the ridge in question is a gentle undulation of the surface. At its highest point, which is near the east line of Rye township, it is about three and one-half feet above the lowest point of the slough. From this high point the ground slopes gently towards the east and towards the west for a distance of a mile in each of said directions. The top of the ridge is only about two feet higher than the prairie at the foot of each of these slopes. From a point 3,000 feet east of the slough to a point 400 feet east of the Rye township line, the bottom of the ditch is generally higher than the top of the grade at the slough, and about midway between these two points the bottom of the ditch is one foot higher than the top of the grade at the slough. In wet seasons the water ran across the highway at the slough. It is manifest that the

highway embankment and ditch could not, under such circumstances, divert the flow of surface water from the slough, and carry it east of the ridge. It follows, therefore, that the plaintiff is in no position to invoke the rule of the civil law as to surface water, because that rule simply forbids the diversion of surface water from its accustomed channels to the injury of another, either by obstructing or diverting a natural channel, or cutting through a natural watershed. As we have seen, it has no application to surface water which does not follow any definite channel, but is diffused generally over the surface.

Counsel, however, contend that the evidence shows that since these highways were constructed in Rye township the flow of surface water on plaintiff's farm has been greatly increased; that this increase is due to no other cause than said highways, and that, if culverts had been provided in these highways from north to south at reasonable intervals, no damage would have resulted. In other words, counsel's proposition is, that even though the surface water has not been diverted from a definite channel, or carried by artificial ditches through a natural watershed, yet the defendant should have so constructed its road that the surface water would not have flowed upon the premises in greater quantities, or in a different manner, from what it naturally was wont to flow, and that if, by the construction of its embankments, ditches and culverts, though constructed in the usual and ordinary manner, larger quantities of surface water were permitted to accumulate, and were discharged upon plaintiff's land in an unusual manner, whereby they sustained injury, the defendant was liable in an action for damages for such injury. In support of this proposition, counsel relies on the maxims: "No one should suffer by the act of another." Rev. Codes 1899, section 5082. "For every wrong there is a remedy." Rev. Codes, section 5085. "One must so use his own rights as not to infringe on the rights of another." Rev. Codes 1899, section 5076. As declared in section 5071, Rev. Codes 1899, the maxims of jurisprudence are not intended to qualify the positive rules of law, but to aid in their just application.

The first maxim has no relevancy to this case. It was intended to be a translation from the Latin of the maxim, "*Res inter alios acta alteri nocere non debet*," and its correct rendering should be, "A transaction between two parties ought not to operate to the disadvantage of a third." It relates only to the law of evidence.

Field's Civ. Code N. Y. section 1975; Broom's Legal Maxims (8th Ed.) p. 954.

It is true that for every wrong there is a remedy, but the wrong referred to is a legal injury. The maxim does not mean that compensation is given for every loss. It simply means that there is a remedy to enforce and protect every legal right, as is indicated by its Latin form, "Ubi jus, ibi remedium." Broom's Legal Maxims (8th Ed.) p. 191.

The third maxim quoted does not mean that one must so use his own rights as not to "damage" another. There is a wide distinction between "damage" and "injury." They bear the same relation to each other as cause and effect. An "injury," in its legal sense, is misconduct, and "damage" is the legal term applied to the loss resulting from misconduct. *City v. Voegler*, (Ind.) 2 N. E. 821. The true sense of the maxim is that one shall not so use his own property as to injure another, or, as our Code expresses it, "infringe on the rights of another." In the case of *Hentz v. Railroad Co.*, 13 Barb. 646, the court said, at page 658, in discussing this maxim: "Private rights should undoubtedly be effectually guarded, but the courts cannot extend the protection of the interest of any so far as to prevent the lawful pursuits of another. The maxim, 'Sic utere tuo ut alienum non laedas,' is true when correctly construed. It extends to all damages for which the law gives redress, but no further. If it should be applied literally, it would deprive us, to a great extent, of the legitimate use of our property, and impair, if not destroy, its value." Again, in the case of *Fisher v. Clark*, 41 Barb. 329, this maxim was relied upon by the plaintiff, and the court said (page 330): "It is well settled that every man has the absolute right to use his own property as he pleases for all the purposes to which such property is usually applied, without being answerable for consequences, provided he exercises proper care and skill to prevent any unnecessary injury to others." In that case the plaintiff claimed that the defendant had turned a flock of scabby sheep into an inclosure adjoining the plaintiff's sheep pasture, and thereby communicated the infectious disease to the plaintiff's sheep to his damage. It was held that the defendant was not liable. In *Panton v. Holland*, 17 Johns. 92, 8 Am. Dec. 369, the plaintiff sought to hold the defendant liable for having dug up the soil on a lot adjoining the plaintiff's lot, whereby the plaintiff's foundation walls were broken and shattered by the withdrawal

of support. The court said, among other things: "‘Sic utere tuo ut alienum non laedas,’ is a maxim admitted to be correct. The extent of its application is to be considered. The plaintiff insists that without reference to the question of negligence the defendant is answerable for damages. In reviewing the cases I am of the opinion that no man is answerable in damages for the reasonable exercise of a right, when it is accompanied by a cautious regard for the rights of others, where there is no just grounds for the charge of negligence or unskillfulness, and when the act is not done maliciously." And numerous cases are cited in support of that statement. See Broom's Legal Maxims (8th Ed.) p. 365, and authorities cited. In order that this maxim may avail the plaintiff, it must appear that the road work was negligently done. It is conceded that the road work was necessary. Aside from the claim that a culvert ought to have been put in at the slough, it is conceded that the work was done in the usual manner. It is evident that the only practicable method was used. Aside from the possible necessity for a culvert at the slough, there can be no pretense of negligence in the construction of these roads. As has already been shown, the absence of a culvert at the slough could not have caused any damage to the plaintiff. The highway ditches were not dug for drainage purposes, but are the necessary incidental result of the only practicable method of making the roads fit for travel. Whatever damage plaintiff has suffered from surface water diverted by these highways is not traceable to any misconduct on defendant's part.

We are of opinion that the ruling of the trial court was proper, and the judgment is accordingly affirmed. All concur.

(101 N. W. 894.)

FLORA R. DOUGLAS v. THE CITY OF FARGO, HERBERT J. GIBSON, AS CITY AUDITOR OF THE CITY OF FARGO, THE BOARD OF EDUCATION OF THE CITY OF FARGO, ARTHUR G. LEWIS, AS COUNTY AUDITOR OF THE SAID COUNTY OF CASS, MELVIN S. MAYO, AS COUNTY TREASURER OF THE SAID COUNTY OF CASS.

Opinion filed November 26, 1904.

In an Equitable Action to Set Aside Tax Sale and Cancel Assessment, Absence of Assessor's Affidavit from Assessment Roll Does Not Invalidate Sale or Levy.

1. In an equitable action brought to set aside a tax sale made in 1897 for the delinquent taxes of 1896, and to cancel the assessment

of taxes and levies of taxes for subsequent years up to and including 1902, the absence of an assessor's affidavit from the assessment does not invalidate the sale or levies in such equitable action. *Farrington v. New England Investment Co.*, 45 N. W. 191, 1 N. D. 102, followed.

Such Omission Fatal in an Action at Law — In Equity, Without an Allegation That the Assessment Was Unfair, Unjust or Fraudulent It Will Not Invalidate.

2. The omission to attach the assessor's affidavit to an assessment roll is an illegal act, and renders such assessment void in an action at law; but such admission will not invalidate an assessment where there is no allegation that the assessment was unjust, unfair or fraudulent, in an equitable action to cancel sales or certificates or taxes made, issued or levied under such assessment.

Equitable Action to Set Aside Taxes — Invalid Assessment — Necessity of Tender.

3. Courts of equity should, in general, interfere to restrain the collection of a tax or annul tax proceedings only where it appears either that the property sought to be taxed is not subject to taxation, or the tax itself is not wholly authorized by law, or the taxes are assessed or levied by unauthorized persons, or the taxing officers have acted fraudulently, or the taxes have been unjustly levied, or the assessment made unjustly or without uniformity; and the plaintiff must, in addition, bring himself within some recognized head of equity jurisprudence, and must also tender or pay the taxes justly chargeable upon his property, before an injunction should issue to restrain the collection of the taxes, unless statutory provisions make such tender unnecessary. *Farrington v. New England Investment Co.*, supra, followed.

Sections 1640, 1643, Comp. Laws of 1887, Repealed.

4. Sections 1640, 1643, Comp. Laws 1887, authorizing the court to render judgment for the taxes due, in lieu of tender, were repealed in 1897 (Laws 1897, p. 297, c. 126, section 110), and no substitute therefor has since been enacted.

In an Equitable Action to Cancel and Set Aside Tax Sale and Levy, Complaint Must Show Tender.

5. In such an action the complaint should show payment or tender of the taxes justly due, or it will be held not to state a cause of action.

Where a Part of Tax Is Legal and Part Illegal, the Legal Portion Must Be Tendered as Condition to Equitable Relief.

6. If the complaint or evidence shows that a portion of the taxes are legal and the amount ascertainable, and a part illegal, a court

of equity will not restrain the collection of the illegal portion, except on condition that the legal portion has been paid or tendered.

Appeal from District Court, Cass county; *Pollock, J.*

Action by Flora R. Douglas against the City of Fargo and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Morrill & Engerud, W. B. Douglas, Newman, Spalding & Stambaugh, and A. B. Lee, for appellant.

Until the assessment has the sanction of the assessor's oath it has no validity, and cannot form the basis of taxation, or said to be finally completed. *People v. Suffern*, 68 N. Y. 321; *Brevoort v. City of Brooklyn*, 89 N. Y. 133; *Van Rensselaer v. Witbeck*, 7 N. Y. 517; *Westfall v. Preston*, 49 N. Y. 349; *Bradley v. Ward*, 58 N. Y. 401; *Bellinger v. Gray*, 51 N. Y. 610; *Eaton v. Bennett*, 10 N. D. 346, 87 N. W. 188; *Marsh v. Supervisors of Clark Co.*, 42 Wis. 502.

Such complete assessment roll is the only evidence of the assessor's acts and intentions. *Eaton v. Bennett*, *supra*; *People v. San Francisco Savings Union*, 31 Cal. 132; *People v. Hastings*, 34 Cal. 571; *Marsh v. Supervisors of Clark Co.*, 42 Wis. 502; *Lee v. Crawford*, 10 N. D. 482, 88 N. W. 97.

Attaching such oath is mandatory. *Eaton v. Bennett*, *supra*; *Cooley on Taxation*, sections 412-413; *Brevoort v. City of Brooklyn*, 89 N. Y. 128.

All property * * * shall be assessed * * * in the manner prescribed by law. *Const. N. D. section 179*; *Hertzler v. Cass County*, 12 N. D. 187, 96 N. W. 294.

An assessment is a judicial requirement, the ground work of all subsequent proceedings. Without it no taxing officer could proceed. The legislature cannot dispense with it, and these matters are constitutional. Its absence is not a mere irregularity nor can the legislature control, excuse or cure it. *Roberts v. First National Bank*, 8 N. D. 504, 79 N. W. 1049; *Bank v. Chestnut*, 14 Ill. 223; *Albany City v. Maher*, 20 Blach. 341; *Evans v. Fall River Co.*, 9 S. D. 130, 68 N. W. 195; 2 *Desty on Taxation*, p. 619; *Cooley on Taxation*, 304; *People v. Holliday*, 25 Cal. 301; *Schumacher v. Toberman*, 56 Cal. 508; *Taylor v. Palmer*, 31 Cal. 241; *People v. Lynch*, 51 Cal. 15; *Stewart v. Shoenfelt*, 13 Serg. & R. 350;

McReynolds v. Longenberger, 57 Pa. St. 13; Hodgson v. Burleigh, 4 Fed. Rep. 111.

Tax laws must be strictly construed. Sharp v. Spear, 4 Hill, 76.

When the manner of doing an act is prescribed, it must be done in that mode. Sutherland on Const. Construction, section 326, note 1 and cases; 1 Desty on Taxation, p. 516, note 14; Painter v. Hall, 75 Ind. 209.

All obligations of a city in excess of the debt limit are void. Lake County v. Rollins, 130 U. S. 662, 9 Sup. Ct. 651; Township of Doon v. Cummins, 142 U. S. 336, 12 Sup. Ct. Rep. 220; Birkholz v. Dinnie, 6 N. D. 511, 72 N. W. 931.

Failure to enter yeas and nays on propositions to create liability against the city render the action void. Section 2143, Rev. Codes 1895; Shattuck v. Smith, 6 N. D. 56, 69 N. W. 5.

No power to assess or levy taxes can be delegated. Const. N. D., section 178; Reelfoot Levee District v. Dawson, 34 L. R. A. 725; Cooley on Taxation, p. 51; Cooley's Const. Lim., pp. 248, 249.

Retaining fruits of prohibited contracts does not subject the corporation to liability. Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292; Goose River Bank v. Willow Lake School Twp., 1 N. D. 26, 44 N. W. 1002; Tennant v. Crocker, 48 N. W. 577; Bladen v. Philadelphia, 60 Pa. St. 464; City of Litchfield v. Ballou, 114 U. S. 190, 29 L. Ed. 132.

The power to levy a tax is limited to a public purpose. The items in the appropriation bill of the legislature for 1901 "For annual dues to League of American Municipalities, \$30," "For tri-state drainage investigation, \$200." The foregoing amounts levied were not for public purposes. Dodge v. Mission Township, 54 L. R. A. 242, 107 Fed. 827; 1 Desty on Taxation, 15, note 11; Hanson v. Vernon, 27 Ia. 47; Ferris v. Vanier, 6 Dak. 186, 42 N. W. 31. 3 L. R. A. 713; Cook v. Portland, 13 L. R. A. 533; 1 Desty on Taxation, p. 17, and note 9; Cole v. LaGrange, 19 Fed. 871; People v. Morris, 13 Wend. 325; Conway v. Cable, 37 Ill. 82; Hart v. Henderson, 17 Mich. 218; Dean v. Borchsenius, 30 Wis. 236; Dean v. Charlton, 23 Wis. 590.

The curative power of the legislature reaches things voidable only, not void. Desty on Taxation, p. 620, note 12; Kimball v. Town of Rosendale, 42 Wis. 412; People v. City of Brooklyn, 71 N. Y. 495; 2 Desty on Taxation, 1285.

The legislature cannot directly exercise the power of assessment or taxation within an incorporated city, but must empower the municipal authorities to do so. *Taylor v. Palmer*, 31 Cal. 241; *People v. Lynch*, 51 Cal. 15; N. D. Const., article 6, section 130; *People v. Common Council*, 28 Mich. 228; *Schumacker v. Toberman*, 56 Cal. 508; *People v. Lynch*, 51 Cal. 15; *Bixler v. Sacramento County*, 59 Cal. 698.

The plaintiff was not obliged to tender money which the property mentioned in the complaint should contribute as taxes for all conceivable purposes, as a condition of relief. The point was not raised or argued in the court below; that court, in attempting to apply a rule of equity, wholly disregarded the practice of equity on such occasions, as respondents, under the equity rule should have demurred. 1 *Daniels on Ch. Pr.* 587; *Marsh v. Marsh*, 16 N. J. Eq. 391; *Miller v. Jamison*, 24 N. J. Eq. 41; *Bliss on Code Pleading*, section 10; *Bonesteel v. Bonesteel*, 28 Wis. 245; 1 *Daniels on Ch. Pr.* 587; *Grimes v. Grimes*, 143 Ill. 550; *Johnson v. Burnside*, 3 S. D. 230, 52 N. W. 1057.

When a tax is absolutely void the defendants have no equity to receive such a tax and plaintiff is under no obligation to pay or tender any part of it. 1 *Pom. Eq. Jur.*, sections 385-386; *N. P. Ry. Co. v. Barnes*, 2 N. D. 310, 51 N. W. 386.

The great weight of authority holds that the law does not require the payment or tender of a tax alleged to be void, as a condition precedent to the relief. *Gage v. Kaufman*, 133 U. S. 471, 10 Sup. Ct. Rep. 406; *Harper v. Row*, 53 Cal. 233; *Cooley on Taxation*, p. 552; *Desty on Taxation*, 908; *Conway v. Cable*, 37 Ill. 82; *Hart v. Henderson*, 17 Mich. 218; *Clement v. Everest*, 29 Mich. 19; *Barber v. Kelly*, 11 Minn. 370; *Barber v. Evans*, 27 Minn. 92, 6 N. W. 445; *Power v. Larabee*, 2 N. D. 141; 49 N. W. 724; *O'Niell v. Tyler*, 3 N. D. 47, 53 N. W. 434; *N. P. Ry. Co. v. McGinnis*, 4 N. D. 494, 61 N. W. 1032; *Eaton v. Bennett*, 10 N. D. 346, 87 N. W. 188; *Salmer v. Lathrop*, 10 S. D. 216, 72 N. W. 570; *Siegel v. Supervisors of Autagamie Co.*, 26 Wis. 70; *Marsh v. Supervisors of Clark Co.*, 42 Wis. 502; *Philleo v. Hiles*, 42 Wis. 531.

In the absence of any legal assessment and levy the owner cannot determine what sum he should tender. *Barber v. Evans*, 27 Minn. 92, 6 N. W. 445; *O'Niell v. Tyler*, 3 N. D. 47, 53 N. W. 434; *Eaton v. Bennett*, 10 N. D. 346, 87 N. W. 188.

Equity will restrain the issue of a deed upon tax sale when the assessment was invalid by reason of the lack of an assessor's return oath attached to the roll, without requiring other proof of injury to the plaintiff from the pretended tax. *Marsh v. Supervisors of Clark Co.*, 42 Wis. 502.

The three-year limit within which to commence suit to quiet title does not apply to this action. *Sweigle v. Gates*, 9 N. D. 538, 84 N. W. 481; *Roberts v. First Nat. Bank*, 8 N. D. 504, 79 N. W. 1049; *Salmer v. Lathrop*, 10 S. D. 216, 72 N. W. 570.

The statute of limitations is not set in motion if the defects relate to matter that is jurisdictional to issue a tax deed. *Roberts v. First National Bank*, 8 N. D. 504, 79 N. W. 1049.

Lack of an assessor's oath is jurisdictional and the statute of limitations does not run. *Eaton v. Bennett*, 10 N. D. 346, 87 N. W. 188.

Emerson H. Smith, for respondents, The County of Cass, Arthur G. Lewis, as county auditor, and Melvin S. Mayo, its county treasurer.

The word "mandatory" in section 29, Const. N. D., as applied to section 197 of such constitution, applies to judicial, not ministerial, acts of the assessor. This is the only construction in harmony with the intent of the two sections mentioned when read together. *Priggs v. Pennsylvania*, 16 Peters 612, 41 U. S. 539; 10 L. Ed. 1061.

The words in section 179 of the constitution, "assessed in the manner provided by law," were used in a popular and not a technical sense, and the court has a right to discover the intent of the framers of that instrument. *Miller v. Dunn*, 72 Cal. 465, 14 Pac. 27.

In determining the office of words used in a constitution the object is to give effect to the intent of the people adopting it. 6 Am. & Eng. Enc. of Law (2d Ed.), 921; *Cooley on Const. Lim.* (5th Ed.) 66; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Newell v. People*, 7 N. Y. 97; *People v. Fancher*, 50 N. Y. 291.

Two things are indispensably essential to an assessment, viz.: First, the property to be assessed must be so described as to mark its identity; second, its identity disclosed, its validity must be determined. The legislature cannot dispense with these requirements nor can they be cured. *Cooley on Const. Lim.* (6th Ed.) 469; *Sinclair v. Learned*, 51 Mich. 345, 16 N. W. 672.

Failure to affix the assessor's affidavit of assessment is merely an irregularity which in no way prejudices the taxpayer. It can therefore be cured and is fully cured by the curative acts of the legislature. Chapters 158 and 166, Laws of 1903.

The levy for 1896 was valid. It is in harmony with the law in force at that time and should be construed to be a valid levy. Conceding that the record of the commissioners discloses two complete levies—one in percentages and the other in specific amounts, as the law required the levy to be made by percentages—only one would be a levy. The same may be said of the levy for 1897. The appearance of two kinds of ink in the entry, without other evidence, raises no presumption against the record. The presumption of the law is that public officers perform their duty in the absence of any showing to the contrary. Subdivision 15, section 5713a, Rev. Codes 1899; *Fisher v. Betts*, 12 N. D. 197, 96 N. W. 132; *Paxton v. State*, 81 N. W. 383; *Chamberlain Banking House v. Doolsey*, 83 N. W. 729.

If the levies were invalid, the legislature has power to declare a prior invalid levy valid; that the said invalid levies were validated. Chapter 159, Laws of 1901; section 3, chapter 158, Laws of 1903; *Smith v. Shattuck*, 6 N. D. 56, 69 N. W. 5; *Wells Co. v. McHenry*, 7 N. D. 261, 74 N. W. 241.

Appellant's property was chargeable with a tax for each year it was assessed; before she can ask relief in a court of equity she must pay, or offer to pay the sums lawfully and justly due according to her theory of the assessment; and that it is not sufficient to offer readiness and willingness to pay whatever may be found to be due; she can obtain relief only after her performance. 1 Pom. Eq. Jur. (2d Ed.) section 385; *Koehler v. Dobberpuhl*, 14 N. W. 644; *Fifield v. County of Marinette*, 22 N. W. 705; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *Hart v. Smith*, 44 Wis. 213; *Cartwright v. McFadden*, 24 Kan. 671, 10 L. R. A., note p. 296; *National Bank v. Kimball*, 103 U. S. 732, 26 L. Ed. 469; *Black. on Tax Titles* (2d Ed.) sections 119, 120; *Wisconsin Cent. Ry. Co. v. Lincoln County*, 30 N. W. 619; *Warden v. Supervisors of Fond du Lac County*, 14 Wis. 618; *Farrington v. New England Investment Co.*, 1 N. D. 102, 45 N. W. 191; *Railroad Co. v. Franz*, 22 Ill. 34; *City of Laurence v. Killam*, 11 Kan. 375; *South Platte Land Co. v. City of Crete*, 7 N. W. 859; *Tisdale v. Auditor General*, 48 N. W. 568; *Smith v. Prall*, 24 N. E. 521; *Morrison*

v. Hershire, 32 Ia. 271; Frost v. Flick, 1 Dak. 131; Clark v. Granz, 2 Minn. 387; Susquehanna Bank v. Supervisors, 25 N. Y. 312.

M. A. Hildreth, for respondents, The City of Fargo, H. J. Gibson, as city auditor, and The Board of Education of Fargo.

The omission of the assessor's affidavit from the assessment roll is at most an irregularity. The legislature could have provided for the omission of this affidavit in the first instance, and it can by a subsequent act cure the defect. *Cooley on Taxation*, 307; *Shattuck v. Smith*, 6 N. D. 79, 69 N. W. 5. While in *Eaton v. Bennett*, 10 N. D. 346, 87 N. W. 188, the provision of section 1219, Rev. Codes 1899, was held to be a mandatory provision, yet, as it was competent for the legislature to omit that provision in the first instance, it can cure it by subsequent enactments. *Farrington v. New England Investment Co.*, 1 N. D. 102, 45 N. W. 191.

MORGAN, J. At the annual tax sale for the year 1897 for the county of Cass, 37 lots owned by the plaintiff in the city of Fargo appeared upon the list to be sold for the delinquent taxes of the year 1896. There being no bidders for said lots, the same were bid in by the auditor for and on behalf of the county of Cass. The taxes on said lots for the years 1897, 1898, 1899, 1900, 1901 and 1902 were not paid, and their validity and the right of the county to enforce them are involved in this action. None of said lots was ever sold or bid in for the county except for the 1896 taxes. The taxes for the years 1897, 1898 and 1899 were charged upon the books of the county auditor as taxes due on said lots subsequent to the sale of 1897. The plaintiff brings this action to set aside the sale of 1897, and to set aside the taxes levied on said lots for the years subsequent to 1896 up to the year 1902, and to enjoin their collection. The grounds relied upon for the relief asked for are specifically set forth in the complaint, and will be referred to later, so far as necessary for the determination of this appeal.

The relief demanded in the complaint is as follows: First, that the sale of said lots for the taxes of 1896 be adjudged void, and said sale set aside; second, that the pretended assessments, levies and taxes upon said lots for the years 1896, 1897, 1898, 1899, 1900, 1901 and 1902 be adjudged null and void, and the same set aside; third, that the auditor of Cass county be enjoined and restrained from collecting the amounts of the pretended assessments and levies against said lots for said years, and that he and his successors be

forever restrained and enjoined from collecting the same, and that he be required to cancel the record of said taxes in his office; fourth, that the plaintiff have such other, further or different relief in the premises as may be just, and the court may see fit to grant, together with the costs.

The grounds upon which it is claimed that the taxes levied upon said lots are void are numerous, and it is claimed that the same grounds exist as to said taxes in each of said years, in several particulars. It is alleged that the assessment roll of the city of Fargo was not authenticated by the assessor during any of said years as required by law. The assessor did not accompany the filing of the assessment roll in the city auditor's office with the verification required by law, and it is claimed that such omission is fatal to the tax and all proceedings subsequently based thereon. Section 2185, Rev. Codes 1899, provides that the city assessor "shall be governed by the same laws and regulations as county and township assessors." Section 1191, Rev. Codes 1895, provides, "The assessor shall make and subscribe an oath to be certified by the officer administering it and attached to the assessment roll." Assuming a verification of the assessment roll by the city assessor to be a requirement imposed upon him by the statute, the same as in cases of county assessors, we are asked to cancel all tax proceedings against plaintiff's lots, and all taxes levied thereon, on account of this omission on the part of the assessor to attach the same to the roll. On plaintiff's part it is claimed that the statute imposing the duty to so verify the assessment roll is mandatory upon him, and his failure so to do renders the assessment entirely void, and that it is not in any sense an assessment; that section 179 of the Constitution, providing that "all property * * * shall be assessed * * * in the manner prescribed by law," gives the taxpayer a constitutional right to demand that every statutory provision relating to procedure on assessment of property be strictly complied with; and that the requirement as to verification is mandatory, and, if omitted, there can be no assessment on which any proceedings can be legally based. On the part of the city and county authorities it is contended that the said constitutional provision relates only to taxation matters, in regard to the assessment, as to matters of substance, and not to matters of authentication of the assessment roll. The plaintiff and defendant both claim that the question has been determined in favor of their respective conten-

tions by the prior decisions of this court. This makes it necessary to review the former decisions of this court in taxation proceedings:

In *Farrington v. New England Investment Co. and the County Treasurer*, 1 N. D. 102, 45 N. W. 191, the effect of an omission to verify the assessment roll by an assessor was before the court. That case was an equitable action to cancel tax certificates issued upon a sale for taxes where the assessor had not verified the assessment roll. The omission was held to vitiate the sale, but it was therein further held that such omission was not fatal in an equitable action, to the extent that the plaintiff was excused from paying or tendering the amount of taxes justly and equitably due upon the property. It was further held in that case that under section 1643, Comp. Laws 1887, no tender was necessary, inasmuch as said section provided for judgment against the owner of the property and in favor of the person paying the tax for the amount of taxes paid by him at the sale, in lieu of a tender. From the reasoning in that case, it is apparent that the action would have been held not maintainable in the absence of tender if section 1643 had not been in force. In that case Wallin, J., dissented, but did not indicate his reason therefor.

In *Bode v. New England Investment Co. and the County Treasurer*, 1 N. D. 121, 45 N. W. 197, involving the same question on the merits as the *Farrington* case, the same result was reached. Although the assessment was held void in these cases if attacked in a law action, judgment was rendered for the full amount of the taxes, including interest and penalties. If judgment can be properly rendered for such taxes under a statute, it must follow that a tender can be exacted of the just taxes due in an equity action to avoid the taxes.

In *Power v. Larabee*, 2 N. D. 141, 49 N. W. 724—an action to quiet title and remove a cloud upon the title caused by a tax deed—it was held that the land attempted to be taxed was not described, and that the board of equalization did not meet to give an opportunity for remedying excessive taxes, and that, in consequence of the fact that the land was not described, the court was unanimous in the holding that there had been no assessment of the land, and that no tender of the taxes justly due was a necessary prerequisite to bringing or maintaining the action. The failure of the board of equalization to meet was held by a majority of the court to be such an omission relating to the assessment, in its substance,

that no tender of the amount of the taxes justly due was necessary. Judge Bartholomew dissented on the proposition that the failure of the board of equalization to meet as required by law rendered the assessment invalid, to the extent that payment or tender was excused, and maintained that the doctrine of the Farrington case should be adhered to, in respect to tender or the rendering of judgment in lieu thereof. In a concurring opinion in that case, Judge Corliss used this language: "The case of *Frost v. Flick*, 1 Dak. 131, 46 N. W. 508, it is true was cited in the prevailing opinion in *Bode v. Investment Co.*, 1 N. D. 121, 45 N. W. 197, but this particular point was not then involved and the writer feels free to express his dissent from that case in so far as by its reasoning and its conclusion it conflicts with the views here expressed." It must be admitted that the reasoning in the Farrington and Bode cases is not in harmony with what was said in a general way by Judge Corliss in the *Power v. Larabee* case. The point involved in the Farrington case (the omission to verify the assessment) and the point involved in the latter case (absence of an opportunity to be heard) are not the same. At all events, it is apparent that the decision of *Power v. Larabee* leaves it doubtful whether the doctrine of the Farrington case has been overruled, in so far as it holds that a tender of the just taxes must be made before an assessment can be attacked in equity upon the sole ground that the assessor omitted the statutory verification.

In *O'Neil v. Tyler*, 3 N. D. 47, 53 N. W. 434—an action to determine adverse claims between individuals, in which the validity of a tax deed was involved—it was held that such an action is an equitable action; that a tender of the taxes justly due and ascertainable was not essential to the maintenance of the action, for the reason that the Compiled Laws of 1887 (sections 1640-1643) provided for a substitute for such tender. It was there stated that the court was, "on principle, * * * opposed to the theory that a taxpayer should, especially where the collection of the revenue is not involved, as a condition of relief, be forced to have his taxes assessed and levied by a court, in lieu of having them assessed and levied by other officers, who are familiar with the subject-matter, and who are especially appointed by law to assess and levy the taxes of all citizens." In that case the doctrine of *Power v. Larabee*, *supra*, that the obligation of payment or tender does not arise on the part of the tax debtor unless the tax is a substantially

legal one, was adhered to. In that case the ground upon which it was held that the tax deed was void was that there was an entire absence of a city levy by authorized persons; that the levy should have been made by the "mayor and council," but the mayor did not take any part in such levy.

In *Railroad Co. v. McGinnis*, 4 N. D. 494, 61 N. W. 1032, the *Farrington* case was followed, in so far that a tender was necessary in equitable actions to avoid taxes in the absence of statute. Among the defects relied on in that case was the fact that the assessor had not verified the assessment roll as provided by law, and such omission was held not sufficient to excuse tender in an equity case; and a judgment for the tax based on such an assessment was ordered, under section 1643, Comp. Laws 1887, and the law and procedure laid down in the *Farrington* case followed. The opinion in this case was written by Judge Corliss after his concurring opinion in the *Power v. Larabee* case, but in it nothing is said that in any way limits the application of the *Farrington* case, as seems to have been done in the *Power-Larabee* case.

In *Eaton v. Bennett*, 10 N. D. 346, 87 N. W. 188—an action to quiet title based on tax deeds claimed to have been void for the reason that the assessor's oath was omitted from the assessment roll—this court held that such omission avoided the assessment in an action to quiet title, but the application of the doctrine was expressly limited to that class of actions. The court said: "It is true that a majority of this court held in *Farrington v. Investment Co.*, supra, that a court of equity will not enjoin the enforcement of a tax on the ground that the assessment was irregular or void, in this: That the assessor's oath was not attached to the roll. * * * But that case will show that the rule there laid down has no application to a controversy such as this, in which public rights are not involved, and where private rights are alone at stake. In the opinion the following language was used * * *: 'In possessory actions between the holder of the tax title and the patent title, where the interests of private parties alone are involved, and where the rule of caveat emptor applies in all its strictness, courts of law are scrupulously careful that no man be deprived of his property through tax proceedings that are not in all respects in substantial compliance with the statutory requirements.'"

In *Pickton v. City of Fargo*, 10 N. D. 469, 88 N. W. 90—an action to annul a city paving tax, and to enjoin the county officials from

enforcing the same—it was held that the action was a proper one and maintainable. The facts of that case showed a failure to give the persons affected by such tax an opportunity to be heard; and it was also held in that case that “substantial injury” to the taxpayer would be presumed from an assessment made without authority of law, and without substantial compliance with the forms of law relating to assessments. In this case the question of tender was not raised nor considered.

No one of these cases is authority for the statement that the rule in *Farrington v. New England Investment Co.*, *supra*, has been departed from. The cases in which the rule of that case has been modified were not cases involving the same facts, and were cases between individuals, involving private rights, in which the public was in no way interested. Such cases were expressly excepted from the rule laid down in the *Farrington* case.

So far as the omission of the verification from the assessment roll by the assessor affects the assessment, when attacked in an equitable action to prevent the public officers from collecting the tax, we are agreed that the omission should not be held fatal to the tax in such an action, when no facts are shown to affect the assessment, further than the mere omission of the assessor's affidavit. Such is the holding in the *Farrington* case, and we think that it is sustained by the better reasoning, and is consistent with the principles applicable in all equitable actions. The plaintiff comes into a court of equity asking for relief, and the merits of his action must be determined by principles applicable in equitable actions. It is nowhere alleged in his complaint that the valuation of his property was excessive or not uniform, or that the omission to verify the roll was through improper or corrupt purposes, that in any way injured the plaintiff. The valuation of his property is not attacked in any particular, and the sole ground for relief is based on the mere absence of the affidavit from the roll when it was filed. This is not enough, in a court of equity, in actions brought by a person to prevent the collection of taxes by the public authorities. The defect is not one that should be held to presumptively show such injury as to warrant a court of equity in enjoining the collection of the tax in the manner provided by law. An allegation and proof that the property was not subject to taxation, or was taxed by an unauthorized person or for a wholly unauthorized purpose, or that the assessment was not uniform or was excessive,

or other similar allegation, or proof showing injury, should be made, before a court of equity will grant relief, unless the plaintiff does equity by paying or tendering what is justly due and ascertainable as a tax upon his property. In the Farrington case, *supra*, it was said: "Courts of equity should, in general, extend the strong arm of their preventive power to restrain the collection of a tax or annul tax proceedings only where the property sought to be taxed is exempt from taxation, or the tax itself is not warranted by law, or the persons assuming to assess and levy the same are without authority so to do, or where the proper taxing officials have acted fraudulently, and, in addition, plaintiff must bring himself within some recognized rule of equity jurisprudence; and, in the absence of statutory provisions regulating the subject, as a condition to relief in equity the applicant must pay or tender the amount of taxes properly chargeable against his property." We are satisfied that this principle is the correct one to follow, and that to follow the one contended for by plaintiff, that no tender or payment is required, would be to violate the plain and well-established doctrine of equity jurisprudence, as generally laid down. The Farrington case announced the better doctrine, and one entirely satisfactory to us. It is well fortified by authority, and the authorities are there collected. We shall not cite them here, but are content to refer to them, and to say that the cases cited sustain the holding in that case, and that the decision in that case meets with our unqualified approval. In addition to the cases there cited, the following are also in point: *Hixon v. Oneida County*, 82 Wis. 515, 52 N. W. 445; *McComb v. Lake County* (S. D.) 70 N. W. 652. Many of the cases cited below are to the same effect as the point now under consideration.

The mere allegation of a want of the assessor's verification is not the equivalent of an allegation that the assessment is excessive, unequal or unjust. Such an allegation does not negative a just and honest assessment. Great stress is laid upon the constitutional provision that property shall be assessed in the manner provided by law (section 179, Const. N. D.), and the contention is made that such provisions are mandatory, and any deviations therefrom render the tax void. So far as this point is concerned, we do not think that the constitutional provision has any application. It is a mandatory provision, as are all provisions of the Constitution, unless the language shows a contrary intent. But admitting that it is a mandatory

provision, and that the verification by an assessor is a part of the assessment, and that its absence renders the assessment void, still we cannot admit the plaintiff's contention that she is thereby excused from doing that which equity requires, when she invokes the aid of equity in relieving her from alleged illegal and void taxes. The record shows that some taxes were legally due in 1896, and, conceding that there were illegal sums included in the 1896 levy, it was a mere matter of computation to ascertain the illegal sums included; and, by deducting such illegal sums from the sum attempted to be levied, the exact sum of taxes legally due could be ascertained. If a part of the levy is legal and a part illegal, the collection of the whole tax will not be enjoined, nor the illegal part, unless the legal part be tendered.

The following additional objections are made to the taxes of 1896: (1) The city levy to pay for paving the street intersections under contracts with one O'Neill was void; (2) the annual appropriation bill of the city did not contain an itemized statement upon which to base the levy; (3) no annual appropriation bill was passed by the city, upon which to base a levy; (4) the city levy exceeds the amount authorized by law; (5) that the county levy is indefinite and uncertain; (6) that the county levy contains amounts in the item of interest and sinking fund not authorized by law. Neither of these objections to the tax goes to the validity of the assessment, as to jurisdictional or fundamental matters. There is no objection made to the levy for 1896 that goes to the validity of the levy in its entirety. Illegal sums or items are claimed to have been included therein, but the amount claimed to be illegal or excessive is shown definitely in specified amounts. Hence the items illegally included in the levy, as claimed by plaintiff, are separable from the legal amounts included in the levy, so that the plaintiff had it within her power to compute with exactness what her legal taxes ought to be if they had been levied only for legal purposes or in legal amounts; and it was her duty to determine what she legally owed, based upon the levy composed of lawful items, as understood or claimed by her. As we look upon the record, this could have been easily done, and would not be uncertain in the result, but would result in an absolute sum, made up of items not claimed to be illegal as items in a levy. To illustrate: Reference is made to the first ground of illegality above named. The specific objection made is that the O'Neill contract created a liability in excess of the debt

limit prescribed by the constitution, and that the contract for paving the streets was not approved by the city council, or entered into by a yea and nay vote, showing the individual vote of the members voting. Under this contract, payment of one-fifth of the amount was to be made annually. The amount to be levied for its payment each year was therefore a definite sum, and, if illegal, the plaintiff could compute the amount of her just tax by excluding this sum from the levy, and compute the amounts legally included in the levy. As the item objected to is an amount certain and fixed each year, the objection that the just amount of taxes due and demandable was not ascertainable is not sustainable.

The next objection is that the annual appropriation bill passed by the council of the city of Fargo for the year 1896 was not fully itemized, so far as it relates to general purposes, but an appropriation of \$32,000 was made "for all other purposes." Under the present statutes (section 2190, Rev. Codes 1899), city levies must be based upon the annual appropriation bill, and the contention is made that the whole levy is void because such appropriation for general purposes is not itemized. We do not think that the plaintiff can avail herself of such contention, if it be admitted to be a valid contention, as a matter of law. The ordinance appropriated money in specific sums for other purposes, such as lighting the streets and improvement of streets and bridges, and as to these items no objection is made; and no objection is made to the levy based upon this 1896 appropriation ordinance, so far as it is itemized, except as to the aggregate sum (\$32,000) levied for "all other purposes." The levy is not, therefore, for an unlawful purpose, in the aggregate, and it is so itemized that it is easy to determine therefrom what plaintiff's taxes would justly be if any illegal sum had been included in the levy. The plaintiff bases her claim for relief upon the sole ground that the sum of \$32,000 appropriated for all other purposes should have been itemized. There is no claim made against the validity of the state taxes, and no valid objection is made against the county taxes, and the objection to the city levy reaches certain items only.

The next objection to the 1896 taxes is that the appropriation ordinance for that year was not regularly passed, by reason of the failure of the proceedings to show the individual vote of the councilmen. We see no valid reason for holding the levy void in its entirety for this reason. The appropriation ordinance is not the levy. The

levy follows such ordinance, and must be based on it. If conceded that the levy was void, still that would not excuse plaintiff from paying the legal taxes before seeking to restrain the public officers from collecting the taxes.

The next contention is that the 1896 levy was excessive in the sum of \$9,694.52. The contention is that the levy exceeded the 20-mill levy authorized by law, by this sum. Conceding that this rendered the levy excessive and void, it brings the levy within the principle heretofore mentioned—that the legal amount due as taxes upon plaintiff's property was ascertainable.

Appellant contends that the county levy for 1896 was void for indefiniteness, because made in percentages as well as in specific amounts. The following is a copy of a part of the levy, as shown by the resolutions: "(3) For bridges, 1.2 mills, making fifteen thousand, two hundred eighty-four dollars." The statutes then in force required the levy to be made in specific amounts. The levy shows that the amounts levied for each purpose were specified. The percentage levy was also specified, but was superfluous, and should be rejected as such, and not considered. The result of the levy by percentages is, however, the same in this case, and no prejudice could follow by reason of the percentage having been named in connection with the total amount levied. The levy was made in specific amounts, and was regular, although coupled with a levy by an illegal method.

The next objection to the 1896 tax is that a sum was included in the levy to pay interest on certain refunding bonds of the county, which it is claimed were illegally issued. The amount thus claimed to have been illegally included in the levy was a definite and fixed sum, and, if illegal, it was a mere matter of computation for the plaintiff to ascertain what sum she was obligated to pay, without including the item of interest claimed to be illegal.

The foregoing comprises all the objections to the 1896 tax. Our conclusion is that not one of them goes to the groundwork of the assessment or of the levies in their entireties, under the rule laid down in the Farrington case, and none of them is of such a character as to warrant a conclusion that the whole assessment or the levies are void in an equity action. Therefore the action cannot be maintained until the plaintiff offers to do equity by paying such taxes as are justly due, when admittedly legal sums are included in the levy with those alleged to be illegal. In all the levies objected

to, the legal sums are readily separable from the alleged illegal ones. It was the plaintiff's duty to ascertain what she deemed justly due, and to tender that sum before asking to have the sale canceled, and the officers enjoined from taking any measures to collect such taxes. She cannot avoid the danger of an outstanding adverse title in some person by enjoining the public officers from collecting the taxes without payment or tender of the taxes justly due. The following cases uphold the principle that such legal taxes as are conceded or can be ascertained by computation must be paid before the public authorities will be enjoined from collecting the taxes: *Thompson v. City of Lexington*, 104 Ky. 165, 46 S. W. 481; *Albuquerque National Bank v. Perea*, 147 U. S. 87, 113 Sup. Ct. 194, 37 L. Ed. 91; *Cooley on Taxation* (3d Ed.) p. 1424, and cases cited; *Hyland v. Brazil Block Coal Co.* (Ind. Sup.) 26 N. E. 672; *Logansport v. Case*, 124 Ind. 254, 24 N. E. 88; *Hyland v. Central Iron & Steel Co.* (Ind. Sup.) 28 N. E. 308, 13 L. R. A. 515; *Briscoe v. Allison*, 43 Ill. 291; *City of Lawrence v. Killam*, 11 Kan. 499; *Bank v. Ferris*, 55 Kan. 120, 39 Pac. 1042; *O'Kane v. Treat*, 25 Ill. 557; *Tisdale v. Auditor General*, 85 Mich. 261, 48 N. W. 568; *City of South Bend v. University of Notre Dame du Lac*, 69 Ind. 344; *M. & O. R. R. v. Moseley*, 52 Miss. 127; *Smith v. Rude Bros.*, 131 Ind. 150, 30 N. E. 947; *County Commissioners v. Union Mining Co.*, 61 Md. 545; *Morrison v. Hershire*, 32 Iowa 271; *Conway v. Township Board of Waverly*, 15 Mich. 257; *German National Bank v. Kimball*, 103 U. S. 732, 26 L. Ed. 469; *O'Neil v. Tyler*, 3 N. D. 47, 53 N. W. 434; *Wisconsin Central R. Co. v. Lincoln County*, 67 Wis. 478, 30 N. W. 619; *Boorman v. Juneau County*, 76 Wis. 550, 45 N. W. 675. *Desty on Taxation*, p. 658, summarizes the rule as follows: "It should be shown as near as possible what part is just and what part is unauthorized, and that which is just should be paid, as a condition of obtaining the relief sought." In *Merrill v. Humphrey*, as Auditor General, 24 Mich. 170, 175: "What the details of the relief shall be, is not so clear. We have already said that the complainant should be required to do equity, as a condition of relief. What is just to the public cannot be done unless he pays within due time such proportion of the tax assessed upon him as he concedes to be fair; and we think this payment should be required by the injunction master to be made to the proper officer, as a condition to the allowance of the injunction."

A tender was unnecessary in the Farrington case, as section 1643, Comp. Laws 1887, was held to authorize rendering judgment for the legal taxes due, and this was held a substitute for a tender. Section 1640, Comp. Laws 1887, provided: "No action shall be commenced by the former owner or owners of lands, or by any person claiming under him or them, to recover possession of land which has been sold and conveyed by deed for nonpayment of taxes, or to avoid such deed, unless such action shall be commenced within three years after the recording of such deed; and not until all taxes, interest and penalties, costs and expenses shall be paid or tendered by the parties commencing such action." Section 1643 provided that "whenever any action or proceeding shall be commenced and maintained * * * to prevent or restrain the collection of any tax or part thereof, * * * or to restrain, prevent, recover or delay any payment of taxes, the true and just amount of taxes due upon such property * * * must be ascertained and judgment must be rendered and given therefor against the taxpayer," etc. These sections were repealed in 1897. See section 110, chapter 126, p. 297, Laws 1897. There is now no statute in force giving the right to render judgment for the taxes ascertained to be justly due in an action like this one, or like the action in the Farrington case, and there is at present no statute law in force that can be properly claimed to be a substitute for sections 1640, 1643, Comp. Laws 1887. It is insisted that chapter 158, p. 209, Laws 1903, and chapter 166, p. 232, Laws 1903, and sections 78, 88, chapter 126, pp. 286, 289, Laws 1897, authorize a judgment to be rendered for the taxes in this case, and that such law does away with the necessity for a tender of the valid taxes, and that said laws are of the same effect as section 1643, Comp. Laws 1887. From a careful reading of these laws, it is apparent that they do not authorize the rendering of judgment for taxes due in a case like this. The facts of this case do not bring the action within the provisions of either of these laws, so far as rendition of judgment is concerned.

After the decision in this case was announced by the trial court, and before findings were made, the appellant asked leave to amend the complaint as follows: "That this plaintiff is willing, ready and able to pay any sum or amount that the court may find that this plaintiff should pay as a valid tax or taxes upon the aforesaid and herein-described lands, or any part thereof, and hereby offers to

pay the same," and, further, "that the court ascertain and find the amount of the valid taxes on the hereinbefore-described property that this plaintiff should pay, that this plaintiff may be enabled to pay the same." The court denied this motion unless the plaintiff deposit in court, within twenty-four hours, the money which the property described in the complaint should contribute as taxes during the years 1896 to 1902, inclusive. No deposit was made of any amount, and the action was ordered dismissed. The amendment asked for should not have been granted. It was not a tender of any sum. It first required the court to determine the legality of all her taxes, in order that she might know what sums to pay. The prayer for amendment was not an equitable one. She must pay or tender whatever sum was ascertainable as due, before her suit is maintainable as an equitable suit. In place of burdening the court with protracted litigation in ascertaining the amount due, during which time she retains all moneys due, she must assume that burden herself, and, as a condition to maintaining the action, make a tender of all sums due under her version of the facts. As said in *Kaehler v. Dobberpuhl*, 56 Wis. 480, 14 N. W. 644: "When a taxpayer undertakes to stop the officers of the law from collecting a tax charged against his property, by a proceeding in equity, he should be required to demonstrate by his complaint that his property is not legally or equitably chargeable therewith." In *Fifield v. Marinette County*, 62 Wis. 532, 22 N. W. 705, it was said: "We must hold, therefore, that a complaint which does not allege in direct terms the injustice and inequality of the tax assessed upon the plaintiff's lands, and further allege a state of facts which, if proved on the trial, would establish the truth of the general allegation of its injustice, does not state facts sufficient to constitute a cause of action for equitable relief unless there be a further allegation of an offer to pay the taxes justly chargeable to the property of the plaintiff on account of which he seeks relief." See, also, *Hart v. Smith*, 44 Wis. 213; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *Palmer v. Township of Napoleon*, 16 Mich. 176; *County Commissioners v. Union Mining Co.*, 61 Md. 545; *Bank of Garnett v. Ferris*, 55 Kan. 120, 39 Pac. 1042; *O'Kane v. Treat*, supra.

We have mentioned the objections to the 1896 tax in detail to show the character of the grounds upon which equitable relief is demanded. For subsequent years, up to and including the 1902

taxes, the objections are either identical or similar in character. Conceding, then, for the purpose of this case, that the levies and assessments are void in courts of law, still, under the rule in the Farrington case, the defects, omissions, irregularities or illegalities do not bring the assessments or levies within any of the classes of assessments or levies that are held void, to the extent that tender or payment may be dispensed with in a purely equitable action. The evidence shows in every case that legal taxes were levied, and this would defeat the plaintiff's prayer for unconditional relief in a court of equity.

The judgment of the district court is affirmed. All concur.

ENGERUD, J., having been of counsel, did not sit in the hearing of the above-entitled cause; Hon. CHARLES J. FISK, of the First Judicial District, sitting in his place by request.

(101 N. W. 919.)

CATHERINE TIMMINS v. PETER RUSSELL.

Opinion filed Nov. 30, 1904.

Vendor Must Act Promptly on Default if He Would Cancel Contract.

1. Before the owner of land who has agreed to convey the same by a contract of sale can cancel the contract for noncompliance therewith, he must proceed promptly to declare his election to cancel on discovery of defaults, and, if he does not proceed promptly to do so, he will be deemed to have waived his right to insist that the vendee has lost his rights in equity on account of failure to comply with his contract.

Waiver of Right.

2. Evidence in the case considered, and found to show a waiver by the vendor of his right to cancel the contract.

Appeal from District Court, Sargent county, *Cowan*, J., sitting by request.

Action by Catherine Timmins against Peter Russell. Judgment for defendant, and plaintiff appeals.

Affirmed.

Barnett & Reese, for appellant.

A waiver of a stipulation in a contract, to be effectual, must be with knowledge and intent to waive. 28 Am. & Eng. Enc. Law, 527; *Bennecke v. Continental Mut. Ins. Co.*, 105 U. S. 359, 26 L. Ed. 990; *Dodge v. Minneapolis Roofing Co.*, 14 Minn. 39;

Boynnton v. Brayley, 54 Vt. 92; Langdon v. Pence, 99 U. S. 578, 25 L. Ed. 420; Fergusson v. Talcott, 7 N. D. 183, 73 N. W. 207.

The vendor acted promptly and notice was seasonably given. Fergusson v. Talcott, *supra*; Shuman et al. v. Marks, 28 N. W. 927; Gardels v. Kloeke, et al., 54 N. W. 835.

J. E. Bishop and Chas. E. Wolfe, for respondent.

It is only in actions against, or proceedings by or against executors, heirs at law or next of kin, in which judgment may be entered against them as such, that evidence of transactions or conversations are incompetent. Riley v. Riley, 9 N. D. 580, 84 N. W. 347.

The incompetency was removed by cross-examination on the same subject; this opened the door to the whole transaction. 3 Jones on Evidence, 792; Michigan Savings Bank v. Estate of Buller, 98 Mich. 381, 57 N. W. 253; Boyd v. Conshohocken Mill, 149 Pa. St. 363; Foster v. Hess, 59 N. W. 193; Smith v. Smith, 101 N. C. 461; Clift v. Moses, 112 N. Y. 426; Hamilton v. Hamilton, 10 R. I. 538, Lawrence, Admn'r, etc. v. Vilas, 20 Wis. 381; Penny v. Croul, 87 Mich. 15; Prescott v. Lambert, 19 Col. 7; Beech v. Bennell, 50 Me. 587.

Conditions in a contract for the sale of land, which provide for a forfeiture, may be waived, and unless strictly insisted upon and diligently pursued will be considered as waived. Fergusson v. Talcott, *supra*; Boyum v. Johnson, 8 N. D. 306, 79 N. W. 149; Pier v. Lee, 14 S. D. 609, 86 N. W. 642.

MORGAN, J. This action was brought for the cancellation of a contract for the sale of real estate, and for the immediate possession of such real estate, on the alleged ground that the defendant has failed to comply with the terms of the contract of sale. The contract was entered into between plaintiff's husband, since deceased, and defendant, on the 11th day of August, 1898. The husband's estate was duly probated, and the land involved in this suit was adjudged by the county court to be conveyed to the plaintiff, who is now the owner thereof, subject to the defendant's rights and possessions under the contract. The plaintiff claims that the defendant has forfeited his rights to the land by failure to comply with the contract in the following particulars: (1) Failure to crop said land in seasonable time; (2) failure to harvest said crop in seasonable time and in a husbandlike manner; (3) failure to crop the required number of acres of wheat on said land during the season of 1902; (4)

failure to deliver to plaintiff the one-half of the wheat raised on said land during the year 1900; (5) failure to pay the taxes on said land for the year 1900. These are the defaults alleged in the complaint as a basis for a cancellation of the contract. The answer of the defendant is a general denial, but alleges that the plaintiff has waived the right to insist on a cancellation of the contract by his agreement with the defendant as to payment of the taxes in the year 1900, and by retention by plaintiff of the one-half of the wheat raised in the year 1900 and other years. The district court found for the defendant, and dismissed plaintiff's action. From the judgment of dismissal plaintiff appeals, and demands a trial de novo under section 5630, Rev. Codes 1899.

At the trial it appeared that the contract in suit was made by the defendant with one Robert S. Timmins, since deceased; that his estate was duly probated, and his real and personal property duly distributed by the county court to his heirs, and that the land involved in this suit was by said court ordered conveyed to the plaintiff, and that the administrator has been discharged and released as administrator; that defendant went into possession under the said contract, and has remained in possession ever since. It further appeared on the trial that the contract sued upon was indefinite in its terms so far as the number of acres to be cropped in wheat each year was concerned, and indefinite in its terms as to the number of acres of crop plaintiff was to receive the one-half of during each year. As to this indefiniteness of the contract, it stated in three places that 300 acres were to be sowed each year, and in one place that 250 acres were to be sowed. Without extrinsic evidence, it would be impossible to say what number of acres the defendant was obligated to sow each year. But the evidence shows that there were but 258 acres broken on the place, and the contract contains no provisions obligating the defendant to do any breaking on the land. So that it is clear the parties could not have intended that 300 acres were to be sowed to wheat each year. Further, the plaintiff's testimony is directed solely toward establishing that 250 acres were not cropped to wheat each year. Then, too, the answer alleges that 250 acres were cropped to wheat in 1902. It is therefore clear that the parties to the contract intended to contract in reference to 250 acres as the number of acres to be sowed each year. No objections or motions were made at the trial directed towards reformation of the contract in this particular. The com-

plaint was treated, so far as the answer is concerned, as claiming defaults by reason of not sowing 250 acres of wheat, and alleged that 250 acres were sowed in 1902. Under such circumstances we will treat the contract as the parties have done, as a contract to sow 250 acres of wheat each year, and to turn over one-half of the wheat raised each year in payment of the purchase price—10,000 bushels of clean wheat. This renders it unnecessary to determine the questions raised whether defendant could give testimony in regard to conversations with the deceased as to what was said by them as to the number of acres to be sowed to wheat each year, and whether such testimony was admissible under a general denial. The record, therefore, presents two questions for determination: (1) Was the defendant in default as to the terms of the contract on March 27, 1902? (2) If in default, was such default waived by the plaintiff by her acts and conduct prior to that date?

The evidence establishes, without material contradiction, the following facts pertaining to these questions: In the year 1899 defendant did not sow 250 acres of wheat, and sowed only about 230 acres. With knowledge of this fact, the one-half of the wheat raised was accepted by plaintiff without objection, or any protest to indicate that the contract was not being complied with. In 1900, defendant sowed only about 220 acres of wheat, and about 38 acres of oats, flax and rye. The wheat raised was not marketable on account of being injured by continued rains, but plaintiff made no objection or protest that the required number of acres of wheat was not sowed, although she had knowledge that such was the fact. In 1901 other grain was raised on the land than wheat, and less than 250 acres of wheat raised thereon. The plaintiff accepted her share without objection. The evidence also shows that during each year prior to 1902 the defendant had not fully complied with the contract in regard to sowing 250 acres of wheat on the land in question, and that no objection was made by the plaintiff to such noncompliance with the contract, although she knew that the contract was not complied with. In the fall of 1901 the defendant plowed about 200 acres of land preparatory to raising a crop thereon in the year 1902. On March 27, 1902, plaintiff served notice on defendant that she elected to cancel the contract for failure on his part to comply with it. In the notice no specific grounds are set forth as constituting the failure to comply with the contract, but simply a general allegation of default. On May 14th, defendant was again

informed by verbal notice that he was in default, and that the plaintiff elected to declare the contract null and void, and that an action would be commenced unless he surrendered the premises to plaintiff. When this last notice was given, defendant had nearly completed the cropping of the land. The action was commenced on August 14, 1902. In 1902 defendant sowed but 215 acres of wheat on the land in question. Plaintiff, after notice, has not accepted one-half of this crop. Defendant deposited the same in an elevator, subject to plaintiff's order. It is claimed by plaintiff that the undisputed fact that but 215 acres of wheat was sowed in 1902 warrants a decree canceling the contract for noncompliance therewith. The contract provides that failure to comply with any of the provisions of the contract shall render it void at the election of the party of the first part, and that time is of the essence of the contract. Was the plaintiff warranted under these circumstances in declaring the contract at an end and canceled on March 27, 1902? We think not.

First, as to the alleged failure to sow 250 acres each year. The evidence shows that this provision of the contract had not been complied with in any year since the contract was made. It shows also that no objection was ever made that the contract had not been complied with by reason of sowing a less number of acres of wheat than was specified. Each year the plaintiff's share of the crop had been accepted, and the defendant permitted to proceed with preparations for the crop of the next year, without plaintiff claiming a forfeiture on the ground that the contract had not been complied with in this respect. During the fall previous to March, 1902, plaintiff accepted her share of the wheat without objection. Thereafter, and in the fall of 1901, defendant plowed over 200 acres of this land, with the intention of farming it the coming year. If plaintiff had grounds for declaring the contract at an end, it should have been done when the default occurred, or when plaintiff became cognizant of it. She had as much knowledge of defaults in the fall of 1901 as in the spring of 1902. No new ground for declaring the contract annulled, so far as the manner of farming was concerned, could have arisen between the fall of 1901 and the spring of 1902. If defaults existed in the fall of 1901, they were waived by accepting the crop from the defendant without objection. Advantage could not be taken of such defaults in March, after the defendant had expended labor in preparing for the next year

in reliance on the fact that he would be continued in possession under the contract. The same may be said of the verbal notice of May 14, 1902. The defendant had then sowed over 200 acres to wheat, and was not through seeding at the time the notice was given. No new default had arisen at that time which was not available to plaintiff in the fall of 1901. This is an equitable action, and plaintiff should not prevail unless she has acted promptly on discovery of defaults, and elected to cancel the contract before defendant has been misled by silence and inaction to his detriment by preparing the land for seeding another year. The language of this court in *Fergusson v. Talcott*, 7 N. D. 186, 73 N. W. 207, is pertinent to this case: "Whether defendants violated their contract in those years is immaterial, for it is undisputed that they were permitted by plaintiff to farm the land in 1895, and this was a waiver of all prior breaches." The opinion in that case further says: "But the power which this option places in the hands of one party to an agreement, after the default has occurred, over the other party, is so great and is so liable to abuse, if the one who wields it is allowed much latitude as to time in making and manifesting his election to give or withhold the notice required to be given by the contract, that a court of equity should exact of him the utmost good faith, fairness, and promptness in deciding that he will terminate the agreement by such notice. * * * It is always possible for him to act without delay. His silence is calculated to induce the belief that he does not intend to insist upon his strict rights."

Conceding that defendant was in default in the fall of 1901, the plaintiff cannot now avail herself of such default, as she has waived it by not acting promptly in declaring that she elected the contract to be at an end and canceled. See, also, *Boyum v. Johnson*, 8 N. D. 306, 79 N. W. 149; *Merriam v. Goodlett* (Neb.) 54 N. W. 686; *Pier v. Lee*, 14 S. D. 609, 86 N. W. 642; *Gaughen v. Kerr* (Iowa) 68 N. W. 694; *Ross v. Page*, 11 N. D. 458, 92 N. W. 822; *Bucholz v. Leadbetter*, 11 N. D. 473, 92 N. W. 830. These cases are authority for holding that the plaintiff in this case has waived the right to cancel her contract and to demand possession of the premises for any defaults occurring during 1901 and prior years. No defaults available to plaintiff under the circumstances existed on March 27th, when she elected to cancel the contract. Contracts permitting forfeiture are harsh, and courts are careful

not to enforce such forfeitures, unless the plaintiff appears without fault, and the defendant's default is not at all attributable to plaintiff's conduct or acquiescence. The defendant did not pay the taxes for 1899. Plaintiff paid them on December 3, 1900. The evidence is conflicting as to whether plaintiff paid them under a special agreement with defendant to do so, or not. Whether she did so or not is immaterial, as such a default in the terms of the contract was waived by plaintiff not promptly availing herself of her rights to cancel the contract on that ground. *Boyum v. Johnson*, supra.

The remaining grounds urged as justifying a cancellation of the contract relate to defendant's failure to properly put in and harvest the crop. It is claimed that he was a poor farmer so far as his work was concerned, and that he did not put the crop in or harvest or thresh it in season. So far as these matters relate to years prior to 1902, they are disposed of under the principles and authorities decisive of the claim that less than 250 acres were seeded each year. They were waived. So far as they relate to 1902, it remains only to say that no grounds for cancellation existed on March 27th. The defendant had not plowed 250 acres in the fall of 1901, but plowing in the fall was not required under the contract, and there is no satisfactory showing that plowing in the spring is necessarily evidence of poor farming. There is competent evidence, by those acquainted with defendant's methods and work, that he is a good farmer. But we rest the decision on the ground that, when the notices were given in the spring of 1902, no defaults existed, and that the attempted cancellation of the contract was without foundation so far as facts are concerned, and cannot be sustained as a matter of law.

In regard to the crop of 1900, the evidence shows that the crop was spoiled by rains after it was cut. The wheat was threshed by defendant and attempted to be marketed, but was rejected as not marketable. Defendant testifies that he offered it to plaintiff after explaining that it had been rejected at the markets, and that plaintiff told him to keep it and use it for feed. Defendant was permitted without objection, and without suggestion from plaintiff or any one else that he was responsible for the loss of this crop, to go on and farm the land during the year 1901, and to prepare for farming the land in 1902. It was too late to claim this as a ground for declaring the contract forfeited in March or May, 1902.

If this ground ever existed as a valid one for canceling the contract, it was not claimed promptly, and was therefore waived.

We discover no valid ground for declaring the contract canceled, and the judgment is affirmed. All concur.

(99 N. W. 48.)

NOTE—To effect a cancellation of contract for sale and purchase of land, the vendor must act promptly. *Kicks v. State Bank of Lisbon*, 12 N. D. 576, 98 N. W. 408; *Smith v. Detroit & D. Gold Min. Co. et al.*, 97 N. W. (S. D.) 17; *Fargusson v. Talcott*, 7 N. D. 183, 73 N. W. 207; *Boyum v. Johnson*, 8 N. D. 306, 79 N. W. 149; *Pier v. Lee*, 14 S. D. 609, 86 N. W. 642.

STATE OF NORTH DAKOTA v. T. J. FORDHAM.

Opinion filed November 30, 1904.

Robbery — Information.

1. An information for the crime of robbery, as defined in section 7117, Rev. Codes 1899, is sufficient to charge a taking with intent to steal the property taken when it charges that the defendant "unlawfully, wrongfully and feloniously * * * did take and carry away," etc.

Same — Instruction as to Intent — Request.

2. It is the duty of the trial court to charge the jury in direct or equivalent terms that, to constitute robbery, the taking of the property must have been with intent to steal it, even though not requested so to do, such intent being a substantive element of this crime.

Preliminary Examination.

3. The record before the committing magistrate examined, and held to show that the defendant was given a legal preliminary examination on the crime for which an information was filed against him.

"Wrongful" Equivalent to "Felonious."

4. The word "wrongful," as used in the statute defining the crime of robbery, is to be construed as synonymous in meaning with the word "felonious."

Appeal from District Court, Grand Forks county; *Fisk, J.*

Thomas J. Fordham was convicted of robbery. From an order granting a new trial, the state appeals.

Affirmed.

J. B. Wineman, State's Attorney, and *B. G. Skulason*, Assistant State's Attorney, for respondent.

In filing an information the state's attorney is not confined to the offense mentioned in the complaint; he may file information for any offense covered by the allegation, or growing out of the transactions set forth in the complaint or necessarily connected therewith. Section 7983, Rev. Codes 1899; *State v. Rozum*, 8 N. D. 548, 80 N. W. 477.

In criminal cases instructions should not be given to the jury unless founded upon some evidence that has been adduced at the trial. *People v. Graham*, 21 Cal. 261; *People v. Sanchez*, 24 Cal. 17; *People v. Murphy*, 47 Cal. 103; *People v. Estrado*, 49 Cal. 171; *People v. Vasquez*, 49 Cal. 560; *People v. Turley*, 50 Cal. 469; *People v. Atherton*, 51 Cal. 495; *People v. Cummings*, 57 Cal. 88; *People v. Hunt*, 59 Cal. 430; *People v. Gilbert*, 60 Cal. 108.

Failure to charge, when no request is made, is not error. *People v. Fice*, 97 Cal. 459, 32 Pac. 531; *State v. Haynes*, 7 N. D. 352, 75 N. W. 267; *State v. Lawler*, 28 Minn. 216, 9 N. W. 698; *State v. Rosencrans*, 9 N. D. 163, 82 N. W. 422; *Thompson on Trials*, sections 2338-2341.

Although the court did not define robbery, but stated that if the evidence showed that the prosecutor was knocked or thrown down, and his money taken from him by the defendant, this would constitute robbery. This was sufficient. *Miller v. State*, 80 Tenn. 223; *Lanford v. State*, 49 N. W. 766; *People v. O'Brien*, 26 Pac. 362; *State v. Dooley*, 57 N. W. 414; *United States v. Mays*, 1 Idaho, U. S. 763; *Long v. State*, 12 Ga. 293.

G. A. Bangs, for respondent.

A preliminary examination is a complete independent judicial investigation. *State v. Haseldahl*, 3 N. D. 36, 53 N. W. 430; *State ex rel. Styles v. Beaverstad*, 12 N. D. 527, 97 N. W. 548; *State ex rel. Durner v. Haegin*, 85 N. W. 1046; *People v. Annis*, 13 Mich. 511; *Yaner v. People*, 34 Mich. 286; *People v. Christian*, 35 Pac. 1043; *Ex parte Nicholas*, 28 Pac. 47.

Information must charge the same offense as the complaint on preliminary examination. *People v. McMillan*, 18 N. W. 390; *People v. Handley*, 52 N. W. 1032; *People v. Evans*, 40 N. W. 473; *O'Hara v. People*, 3 N. W. 161; *Brown v. State*, 64 N. W. 749; *People v. Christian*, 35 Pac. 1043; *People v. Howland*, 44 Pac. 342; *People v. Parker*, 27 Cal. 537; *People v. Wallace*, 29 Pac. 950; *Ex parte Baker*, 25 Pac. 966; *State v. Farris*, 51 Pac. 772;

Davis v. State, 22 S. W. 979; State v. Barnes, 3 N. D. 131, 54 N. W. 541.

It is a fundamental right of every person to be free from the expense, annoyance, humiliation and danger of a trial before a petit jury, save upon an accusation by a duly constituted tribunal based upon probable cause disclosed by oath or affirmation. Jones v. Robbins, 8 Gray 324; 2 Cooley's Blackstone, 306, bk. 4; 1 Wharton's Criminal Law, 152; State v. Barker, 12 S. E. 115; State v. Kingsley, 26 Pac. 1066; State v. Barnes, 3 N. D. 131, 54 N. W. 541; Art. 1, N. D. Const. sections 7, 8, 13 and 18.

The "right of trial by jury" and "due process of law" requires an indictment or presentment to adequately guard his right. Jones v. Robbins, supra; State v. Barnes, supra; In re Dolph, 28 Pac. 470; State v. Brett, 40 Pac. 873; State v. Bowser, 53 Pac. 179; State v. Little Whirlwind, 56 Pac. 820; State v. Barker, 12 S. E. 115.

After the filing of an information, arrest, arraignment and imprisonment or bail are required, by which one may be deprived of his liberty under a warrant based on information and belief. Section 18 Art. 1, Const. N. D.; Ex parte Burford, 3 Cranch (U. S.) 448, 2 L. Ed. 495; U. S. v. Collins, 79 Fed. 65; In re Way, 41 Mich. 299; Swart v. Kimball, 5 N. W. 635; People v. Swift, 59 Mich. 529; People v. Moore, 62 Mich. 496, 29 N. W. 80; Ex parte Dimmig, 15 Pac. 619; Ex parte Spears, 26 Pac. 608.

The information does not state facts constituting a public offense in this, that it does not allege an unlawful intent, or the animus furandi. U. S. v. Carll, 105 U. S. 611, 26 L. Ed. 1135; U. S. v. Simmons, 96 U. S. 360, 24 L. Ed. 819; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; Keck v. U. S., 172 U. S. 434; U. S. v. Hess, 124 U. S. 483, 31 L. Ed. 516; U. S. v. Britton, 107 U. S. 655, 27 L. Ed. 520; Blitz v. U. S., 153 U. S. 308, 14 Sup. Ct. Rep. 924; Moore v. U. S. 160 U. S. 268, 16 Sup. Ct. Rep. 294; Com. v. Bean, 14 Gray, 52; Com. v. Clifford, 8 Cush. 215; Mathews v. State, 4 Ohio St. 540; Com. v. Bean, 11 Cush. 414.

Felonious intent requires the same allegation and proof as in larceny. 2 Bishop's New Criminal Proc. 1007; Bishop's Directions and Forms, section 931; Sledge v. State, 26 S. E. 756; Mathews v. State, 4 Ohio St. 540.

Robbery is compound larceny and under an indictment for robbery the defendant may be found guilty of larceny. The indictment

must contain the essential allegations of larceny. *Haley v. State*, 4 S. W. 746; *People v. Nelson*, 56 Cal. 77; *People v. Jones*, 53 Cal. 58; *People v. Crowley*, 100 Cal. 480, 35 Pac. 84; *People v. Git*, 34 Pac. 1080; *People v. Ammerman*, 50 Cal. 15; *State v. Segermond*, 19 Pac. 370.

It is the duty of the court to interpret the indictment and give its legal effect. It must clearly instruct the jury as to the law of the case. All the essential elements of the crime must be given. *Territory v. Baca*, 71 Pac. 460; *State v. McCasky*, 16 S. W. 511; *McDow v. State*, 39 S. E. 295; *State v. Fulford*, 32 S. E. 377; *Bailey v. State*, 30 S. W. 669; *Putnam v. State*, 16 S. W. 97.

The intent to deprive the owner of the property to convert it in bad faith to a use not to his advantage, in other words to steal it, is an essential element of robbery. 2 Bishop's New Crim. Law, 1162a; *State v. O'Connor*, 16 S. W. 510; *State v. Woodward*, 33 S. W. 14; *Mathews v. State*, 4 Ohio St. 540; *Com. v. White*, 133 Pa. 182, 19 Atl. 350, 19 A. S. R. 628; *People v. Hughes*, 39 Pac. 492.

MORGAN, J. The defendant was convicted of the crime of robbery from one Bert Click, and sentenced to three years in the penitentiary. Prior to entering a plea of not guilty, he moved to set aside the information upon the alleged ground that he had not been given a preliminary examination as provided by law for the offense for which he had been informed against. This motion was denied by the court. The information filed against him is as follows, so far as charging the offense is concerned: "That at said time and place the said T. J. Fordham violently, wrongfully and unlawfully did make an assault upon the person of one Bert Click, and then and there unlawfully, wrongfully and feloniously, accomplished by means of force and fear, did take and carry away from the person and possession of the said Bert Click, the owner thereof, against the will of the said Bert Click, a certain sum of money, to wit, five dollars in silver coin, lawful money of the United States, a more particular description whereof is to this informant unknown, and of the value of five dollars; also one pocket knife, the property of said Bert Click, of the value of one dollar; also one pair of link cuff buttons, the property of the said Bert Click, of the value of one dollar; also one engineer's license and engineer's book, property of the said Bert Click, of the value of one dollar; and therein did commit the crime of robbery. This contrary," etc. The defendant demurred to the information upon the ground,

among others that the same did not state facts sufficient to constitute a public offense. The demurrer was overruled. After trial, and before sentence, the defendant moved in arrest of judgment upon various grounds, and the motion was denied. Thereafter the defendant moved for a new trial upon the minutes and records of the court and upon a statement of the case to be settled. This motion contains twenty-nine specific grounds which were urged as errors warranting the granting of a new trial, but these alleged grounds may be summarized as follows: (1) The refusal to set aside the information upon the alleged ground that no preliminary examination was given to the defendant for the offense for which he was informed against; (2) the overruling of the demurrer interposed to the information; (3) errors in admitting certain evidence: (4) errors in instructions given to the jury and in refusing certain requested instructions. The court granted this motion for a new trial by a general order, not specifying the grounds upon which is based said order, and set aside the sentence theretofore imposed. The state has appealed from said order, and specifies as error the granting of that order.

If all of the defendant's exceptions were without merit, it was error to grant a new trial. The first error complained of is that the information should have been set aside for the alleged reason that no preliminary examination was given to the defendant for the offense charged in the information, and the defendant has for that reason not been convicted by due process of law. The record shows that the defendant, with four others, was brought before a justice of the peace, charged in the complaint with the crime of robbery, committed by them by taking \$15.40, two knives, and shirt studs from four persons named therein, of whom Bert Click was one. The contention is that the crime charged by the information is a different crime from the one charged in the complaint before the committing magistrate. In the complaint before the magistrate and in the information the crime charged is robbery from the person. In justice court five persons were charged with jointly robbing four persons. In the information the defendant is separately charged with robbery committed by the same acts that he was charged with in the complaint before the magistrate in connection with the others, and for which charge he had a regular preliminary examination, and was regularly held to appear in the district court. The charge in the information is not different as a matter of law,

from the one contained in the complaint in justice court. A joint charge includes a separate charge against each person jointly charged. Defendant was not informed against by the state's attorney pursuant to an examination by him made under section 7983, Rev. Codes 1899. The information followed and was based exclusively upon a regular preliminary examination held by a committing magistrate pursuant to statute. We are not, therefore, called upon to consider the contention of the defendant that said section 7983 is unconstitutional so far as it authorizes the state's attorney to file an information against a person for a higher or different offense from that charged against him before the committing magistrate. After an inquiry and examination by him of all the facts of the case, we have no hesitancy in holding that the defendant has had a preliminary examination for the identical offense for which an information was filed against him. Conceding, however, that the two offenses are not identical, as charged in the complaint and in the information, still the motion to quash was properly denied under the previous decision of this court in construing section 7983. In *State v. Rozum*, 8 N. D. 548, 80 N. W. 477, the court said: "It is clear from these provisions that in filing an information the state's attorney is not limited strictly to the offense named in the complaint. How far he may depart therefrom we are not now called upon to decide. To this extent we are clear: The state's attorney may file an information for any offense covered by the allegations in the complaint, or growing out of the transaction therein set forth, or necessarily connected therewith. * * * In the case at bar the added allegation covered no further criminal act or criminal purpose on the part of the accused. * * * There was therefore no possibility that the accused could be surprised or prejudiced by reason of the added allegation, and under our statutes it was clearly proper." The offense charged in the complaint and the one charged in the information is that of robbery, and the constituent elements of that offense as charged in each are the same.

The defendant also urges that it was error to overrule his demurrer to the information upon the ground that it does not allege, directly or in substance, that the property was taken with intent to steal it. Robbery is defined in the statute as "a wrongful taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means

of force or fear." The information in this case charges that the property was wrongfully and feloniously taken. Every ingredient of the crime, as defined by the statute, is covered by the allegations of this information. It is true that a taking with intent to steal is essential to constitute the crime of robbery, but the intent to steal is covered by the use of the word "wrongful." "Wrongful," in this connection, means not a mere taking without authority of law, but the word is to be construed in its most comprehensive meaning, and includes within its meaning a taking with an evil motive or with a criminal mind. In this connection it is synonymous with "felonious;" and it is well settled that the word "felonious," when used in defining the crime of robbery or larceny, implies an intent to steal. *People v. Moore*, 37 Hun (N. Y.) 84, 93, 94; *State v. Bush*, 47 Kan. 201, 206, 207, 27 Pac. 834, 836, 13 L. R. A. 607; *State v. Hogard*, 12 Minn. 293 (Gil. 191); *State v. Rechnitz*, 20 Mont. 488, 52 Pac. 264; *People v. Ah Sing*, 95 Cal. 654, 30 Pac. 796. See, also, authorities collected in note to section 211, *Pomeroy's Annotated Code of California*. The demurrer was properly overruled.

Error is also predicated upon the instructions given to the jury. This instruction is excepted to: "The first question, therefore, for you to decide, will be as to whether or not a crime was committed by somebody, as charged in the information; that is, as to whether or not, at the time and place mentioned, somebody took from the person of said Bert Click, against his will, and by means of force, the personal property described. * * * If you find that a crime was committed in the manner and form as charged in the information, then you will next determine as to whether or not this defendant is the person who committed such crime. * * *" The court had previously read to the jury the statutory definition of the crime of robbery, and also stated to them the allegation of the information. The court had also given them the following instruction: "The material allegations of the information are that at the time and place stated in the information the said Bert Click was robbed of the property mentioned in the information. * * * Second. That this defendant is the person who robbed him, or that he aided and assisted others in accomplishing such robbery." The objection urged against this instruction is that the intent with which the property was taken from Click is not stated as a material ingredient of the offense. The charge does not, in the instructions quoted, nor elsewhere, directly inform the jury that the property

must be taken with intent to steal it before the crime of robbery is committed. Nor are equivalent words used to inform the jury that the intent with which the property is forcibly taken is material. The general statements that, if the defendant had committed the crime charged in the information, he should be found guilty, is not sufficiently specific as to the ingredients of the crime of robbery. The intent with which the property is taken is a controlling element in robbery cases upon the question of guilt. The jury were not so informed in direct or equivalent language that such a taking only would warrant a conviction. The defendant was entitled to an instruction stating the substantive elements of the crime. The jury may well have inferred that a taking by force was a felonious taking, and constituted the crime of robbery. The crime of robbery, as defined by this statute, is substantially the same as the common-law crime of robbery. A wrongful taking of property by force or putting in fear is not necessarily robbery. Property may be thus taken under a bona fide claim of right, or under a defective process. In such cases the crime of robbery is not committed. There must exist a felonious taking, and, unless such taking is proven, no conviction can be sustained. The word "wrongful" in this statute must be construed as equivalent in meaning to the word "felonious;" that is, with intent to steal the property. As said in *State v. Rechnitz*, 20 Mont. 488, 52 Pac. 264: "But the mental element of larceny must, we think, be still marked by using the word 'feloniously' or by equivalent words. There must be accompanying the taking an evil intention. * * * And, after fully considering the statute of this state defining larceny, we find ourselves unable to construe it without importing into its meaning the qualifications ordinarily imported in the construction of criminal statutes, namely, that there must be a guilty mind as well as a guilty act to constitute a crime. * * * The principles which controlled before the adoption of a statutory rule should be applied afterwards as before, that the reason of the act may be arrived at, and a rational construction obtain." See, also, *Clark on the Law of Crimes*, section 379; *State v. Fulford*, 124 N. C. 798, 32 S. E. 377; *State v. McCaskey*, 104 Mo. 644; *Sledge v. State*, 99 Ga. 684, 26 S. E. 756; *McDow v. State*, 113 Ga. 699, 39 S. E. 295; *State v. Oliver*, 20 Mont. 318, 50 Pac. 1018. These cases establish the principle that the elements of the crime should be stated by the court in its charge, even in the absence of request, and such seems

to be the law laid down in the code in respect to the duties of the court in charging the jury. The duty of the court to charge the jury upon the law of the case is especially laid down in the statutes, and this cannot be held to mean less than that it is always necessary that the jury be fully instructed as to all the elements of the crime. After the court has instructed the jury that they must decide whether a crime "had been committed as charged in the information," he followed such statement by this general explanation: "That is, as to whether or not, at the time and place mentioned, somebody took from the person of said Bert Click, against his will, and by means of force, the personal property described in the information," etc. This explanation of the previous sentence, referring to the crime "as charged in the information," left out an essential ingredient of the crime—the felonious or wrongful taking—and was misleading. The words "felonious" and "wrongful," as applied to the taking of property as constituting robbery, should have been defined or explained. *People v. Byrnes*, 30 Cal. 207. That it is the duty of the court to charge fully as to the substantive elements of a crime is held in the following cases under statutes similar to our own: *State v. Cody*, 18 Or. 506, 23 Pac. 891, 24 Pac. 895; *People v. Murray*, 72 Mich. 10, 40 N. W. 29; *State v. Clark*, 78 Iowa, 492, 43 N. W. 273; *State v. O'Hagan*, 38 Iowa, 504; *Lang v. State* (Tenn.), 1 S. W. 318; *State v. Banks*, 73 Mo. 592. For the omission to charge the jury that the taking must be felonious, or with intent to steal the property, or by some other language defining that the taking must be wrongful in such sense, a prejudicial error was committed on the trial.

The order is affirmed. All concur.

(101 N. W. 888.)

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OLE TEIGEN V. ROBERT J. DRAKE.

Opinion filed December 3, 1904.

**Unless it Appears That a Defense Was Pleadable in a Former Action,
Judgment Therein Is Not Res Judicata.**

1. A judgment establishing the validity of a mortgage rendered in an action to quiet title is not available as *res adjudicata* against a plea of the statute of limitations, interposed in a subsequent action between the same parties to foreclose the same mortgage, where it does not appear that the conditions were such that the statute of limitations could have been made available as a defense in the former action.

Defendant Enjoining Foreclosure by Advertisement Is Not Estopped to Plead Statute of Limitations in Subsequent Foreclosure Suit.

2. The mortgage which the plaintiff was seeking to foreclose by action contained a power of sale; but the defendant had procured an order under section 5845, Rev. Codes 1899, enjoining a foreclosure sale under the power. *Held*, that the defendant was not thereby estopped to plead the statute of limitations in bar of the action.

Foreclosure.

3. As to whether or not the right to foreclose by advertisement under a power of sale continues after an action to foreclose is barred by the statute of limitations is not decided.

Appeal from District Court, Nelson county; *Fisk*, J.

Action by Ole Teigen against Robert J. Drake. Judgment for defendant, and plaintiff appeals.

Affirmed.

Scott Rex, for appellant.

Chapter 120, Laws 1901, is wholly inoperative so far as the mortgage in suit is concerned, it having been passed Feb. 27, 1901, when more than ten years had already run since the right to foreclose accrued, said act having an emergency clause. *Merchants National Bank v. Braithwaite*, 7 N. D. 358, 75 N. W. 244; *Osborne v. Lindstrom*, 9 N. D. 1, 81 N. W. 72.

There being no statute limiting the time within which a mortgage containing a power of sale is to be foreclosed, the only limitation on the right to foreclose under the power is the bar of the statutory period of adverse possession, or the common law presumption of payment arising from the lapse of twenty years. *Hayes v. Frey*, 11 N. W. 695; *Fievel v. Zuber*, 3 S. W. 273, 67 Tex. 275; *Grant v. Burr*, 54 Cal. 298; *Golcher v. Brisbin*, 20 Minn. 453; *Opie v. Castleman*, 32 Fed. 511; *Menzel v. Hinton*, 44 S. E. 385; *Cone v. Hyatt*, 44 S. E. 678; *Stevens v. Osgood*, 100 N. W. 161.

Under section 5845, Rev. Codes 1899, respondent compelled the appellant to foreclose by action so that he could plead the statute of limitations as a defense. This statute is a weapon of defense and not of attack. *Grant v. Burr*, 54 Cal. 298; *Phelan v. Fitzpatrick*, 54 N. W. 614, 19 Am. & Eng. Enc. Law, 177, viii-2b; *McKeen v. James*, 23 S. W. 464; *Johnson v. Wynne*, 67 Pac. 549; *Burditt v. Burditt*, 64 Pac. 77; *Corlett v. Mutual Ben. Life Ins. Co.*, 55 Pac. 844; *DeWalsh v. Braman*, 43 N. E. 597.

Respondent was the aggressor; having by the procedure under that statute forced appellant to abandon foreclosure by advertisement, and compelled him to foreclose by action, he cannot now use the statute of limitations against the appellant. Courts of equity have long exercised the power of restraining sale by advertisement in a proper action showing the facts necessary to entitle him to an injunction in equity. *Jones on Mortgages* (5th Ed.), sections 1801, 1804, 1805.

The sole purpose of section 5845 is to simplify the old procedure, doing away with the bill in equity and a bond for costs, etc. *McCann v. Mortgage Co.*, 3 N. D. 172, 54 N. W. 1026.

Respondent, having invoked the power under such section, must do equity just as certainly and to the same extent as if he had brought the action to restrain foreclosure, in which case he would be required to pay the amount justly due on the mortgage, under the maxim, "He who seeks equity must do equity." 19 Am. & Eng. Enc. Law (2d Ed.) 178; *Tuthill v. Morris*, 81 N. Y. 94.

The procedure under section 5845 is an appeal to the equitable side of the court. An adverse claim procedure under the statute is wholly of statutory origin, and it is well settled that a suit to determine adverse claim is a suit in equity. 17 Enc. Pl. & Pr. 292; *Moore v. Clackamus County*, 67 Pac. 662; *Mathews v. Lightner*, 85 Minn. 333, 88 N. W. 992.

Whoever has compelled his adversary to come into court and litigate under the provisions regarding actions to determine adverse claims, cannot plead the statute of limitations against him. When the mortgagee began foreclosure by advertisement upon the outlawed mortgage and was enjoined by the mortgagor under section 5845, the defense of the statute of limitations is bad and judgment of foreclosure should be ordered and affirmed on appeal. *Stevens v. Osgood*, 100 N. W. 161.

Respondent brought suit to determine an adverse claim against the appellant for the purpose of removing the mortgage in suit as a cloud on his title; he declined to do equity by paying the mortgage and sought to set up the statute of limitations. In such action appellant could have asked for a foreclosure judgment. *DeWalsh v. Braman*, 160 Ill. 415, 43 N. E. 579; *Pom. Eq. Jur.*, section 386. He preferred to take a decree establishing the ownership, lien and validity of his mortgage, thus setting at rest forever all disputed questions in relation to his right to foreclose. The

judgment in that action settles in appellant's favor every matter of defense raised herein or could be raised against the foreclosure of the mortgage in suit.

The finding by the court below that the plaintiff's cause of action was barred by the statute of limitations under subdivision 2, section 5200, Rev. Codes 1899, as amended by chapter 120 of the Laws of 1901, is a conclusion of law pure and simple, and has no place in the findings of fact and should be disregarded by this court. *Satterlund v. Beal*, 12 N. D. 122, 95 N. W. 518; *Bell v. Yates*, 33 Barb. 627; *Richmond Natural Gas Co. v. Enterprise Nat. Gas Co.*, 66 N. E. 782.

Frich & Kelly and *Tracy R. Bangs*, for respondent.

Proceedings to restrain foreclosure by advertisement are entirely statutory; they cannot be assimilated to, or classed with, the remedy by injunction, as that remedy is administered in a civil action in an equity case. *McCann v. Mortgage Bank & Ins. Co.*, 3 N. D. 172, 54 N. W. 1026.

It was not a proceeding in court. It is the judge who makes the order, not the court. *Travelers Ins. Co. v. Weber*, 2 N. D. 239, 50 N. W. 703.

A proceeding to foreclose a mortgage by advertisement is not an action, nor is the power of the court of law or equity invoked. *Stevens v. Osgood*, 100 N. W. 161. The same is true of the proceedings under section 5845, Rev. Codes 1899, to restrain the foreclosure sale, so that the mortgagor in procuring the restraining order was not proceeding in equity, and was not seeking equitable relief as a preliminary step; he was not bound to "do equity," whatever may be the nature of the "valid defense," which he claims to have. Neither the proceedings to foreclose by advertisement nor those to procure the restraining order were any part of the present case. By the service of the restraining order those proceedings came to an end and the plaintiff was at liberty to commence his suit in equity or not, as he might elect. Plaintiff elected to proceed with the foreclosure by action, in which the mortgagor was not made a party, and therefore had no interest in coming in and setting up the defense he might have, but it was left to the defendant, Drake, to look after his own interests, without any aid from the mortgagor. Drake answered to the complaint and pleaded the statute of limitations as a defense. This defense

can no longer be regarded with disfavor by the courts, and that as a defense it stands on a par with other legal and meritorious defenses. *Wheeler v. Castor*, 92 N. W. 381, 11 N. D. 347.

Appellant claims that the decision of the lower court in the former case of *Drake* against *Teigen et al.*, which was an action to determine adverse claims, to the effect that the mortgage now in suit was "a good, valid and subsisting lien on the real estate described in the mortgage," is conclusive upon the defendant, *Drake*, in this case. In this state the statute of limitations is a statute of repose, and in no way acts upon the merits of the cause, but affects the remedy only. Lapse of time gives no presumption of payment or discharge or extinguishment of a lien. 19 Am. & Eng. Enc. Law 178; *Hulbert v. Clark*, 28 N. E. 638; *Spect v. Spect*, 26 Pac. 203; *Grant v. Burr*, 54 Cal. 298; *Kelly v. Leachman*, 33 Pac. 44.

The running of the statute raises no presumption of payment and does not discharge a debt, neither will it give rise to the presumption that the lien of a mortgage has been discharged, nor will it extinguish the lien of a mortgage. The defense of the statute of limitations must be pleaded or it is waived, and a decree may be rendered that is as valid and effectual as if the action were brought the day after the cause of action accrued. So the mere finding and judgment in the action to determine adverse claims, that on July 30th, the mortgage was a valid and subsisting lien, does not conclude defendant from pleading the statute of limitations for the foreclosure of the mortgage. The question of the running of the statute was not litigated in the action to determine adverse claims nor could it have been because that question was entirely immaterial, the plaintiff having no right to quiet his title as against the holder of a mortgage without payment of the mortgage debt. *Boyce v. Fisk*, 42 Pac. 473; *Spect v. Spect*, 26 Pac. 203; *Booth v. Hoskins*, 17 Pac. 225; *Hall v. Hooper*, 66 N. W. 33.

The statute of limitations affects the remedy only, and a mortgagor may have a good, valid and subsisting lien by a mortgage, and still be unable to enforce it.

ENERUD, J. This is an action to foreclose a mortgage on real property. The statute of limitations was the only defense, and that plea was sustained by the trial court. The plaintiff has appealed from the judgment. No statement of the case was

settled, but the appellant assigns error on the judgment roll. It is conceded that the statute had run against the right to maintain this action; but appellant contends that the defendant is estopped to plead that defense.

On the 30th day of July, 1903, in an action to quiet title and determine adverse claims to the land in question, commenced by the respondent, Drake, against this appellant and others, a judgment was entered adjudging that the mortgage now in question was a valid and subsisting lien on said land, and that said Drake was the owner of the land under a quitclaim deed from one Hagen, the original mortgagor. Thereafter proceedings were commenced to foreclose the mortgage by advertisement under the power of sale. A sale under those proceedings was prevented by an injunctive order issued under section 5845, Rev. Codes 1899. This order was applied for and obtained at the instigation of this defendant by the original mortgagor, Hagen. The record, however, does not disclose what defense was set forth in the affidavit to procure that order. In obedience to the injunctive order the plaintiff abandoned the foreclosure under the power of sale, and commenced this action. The appellant contends that the statute of limitations does not bar the right to foreclose under a power of sale; that the defendant, having procured an injunction against that remedy, has compelled the plaintiff to resort to an action as his only remaining remedy. He argues that to permit the statute of limitations to be pleaded under such circumstances will, in effect, make the statute a bar to foreclosure under the power of sale, because the mortgagor may present groundless defenses in his affidavit for the ex parte injunction under section 5845, and, by pleading the statute of limitations against the action, prevent any hearing or determination of these other alleged defenses. If that situation has been brought about by section 5845, it is the result of legislation, which the court has no power to disturb, so long as it violates no provision of the constitution. The right to plead the statute of limitations has been granted by the legislature. Under what circumstances the right to that defense shall be permitted or denied is exclusively a legislative question. The statute nowhere forbids resort to that plea under the circumstances of this case. The court cannot refuse to give effect to the plea on the ground of estoppel, because to do so would be equivalent to amending the statute and ingrafting upon it an exception.

The judgment in the action to quiet title is not available as res adjudicata of the issue raised by the answer in the case at bar. Even if we assume, as a matter of law, that the issues in the two actions were identical, and that the statute of limitations could be properly pleaded in the former action, yet the record before us does not disclose facts sufficient to constitute an estoppel by judgment. The former judgment was entered in July, 1903. This action was commenced after September 12, 1903. For aught we know, the time limited by the statute may not have expired until after the entry of that judgment. The record before us furnishes no information upon that point. The defense relied upon in this case is one that comes into being by lapse of time. Absence from the state or certain disabilities toll the running of the statute. A former judgment, therefore, is not conclusive against these defendants unless it is made to appear that all the conditions essential to this defense were the same in the former action as they are in the subsequent one.

As to whether or not the right to foreclose under the power of sale is barred after the expiration of the time limited for commencing an action to foreclose, we express no opinion, because that question does not arise on this record.

There is nothing in this record disclosing any impropriety in the issuance of the injunctive order; but, even if there were, that fact would not justify the denial by the court of the defendant's right to avail himself of the statutory defense to this action. If for any reason the injunctive order was improperly issued, it should have been attacked directly by an appropriate proceeding.

The judgment is affirmed. All concur.

(101 N. W. 893.)

ANDREW THURSTON V. OSBORNE-McMILLAN ELEVATOR COMPANY.

Opinion filed December 3, 1904.

Where a Wife Is the Vendee in an Executory Contract for the Purchase of Land, the Fact That Her Husband Works for Her Proves No Title in Him.

1. Where husband and wife reside on land held by the wife under an executory contract for the purchase thereof, which requires the wife to farm the land, the fact that the husband devotes his time and labor to the cultivation of the land does not prove that he has any interest in the crop so that a mortgage given by him will create any lien thereon.

Where the Vendor in Such Contract Reserves Title to Crops Until Division Thereof, Mortgage Attaches Only Upon Such Division.

2. Where an executory contract for the sale of land reserved to the vendor the title to all crops grown on the land until certain conditions were performed by the vendee, and the vendor relinquished all his right to the crops in consideration of the cancellation of the contract, the full title to the crops vested in the vendee, and would become subject to the lien of a chattel mortgage previously executed by her.

Where Surety Pays a Debt Secured by Chattel Mortgage He Becomes Vested With the Title to the Note and Mortgage — May Sue for Conversion of the Mortgaged Property.

3. The plaintiff was a surety for the payment of a note which was secured by a chattel mortgage given by the principal debtor. He was obliged to pay the note at maturity. *Held*, that such payment vested the ownership of such note and mortgage in him, and he could maintain an action to recover the value of the mortgaged property, to the extent of his lien, from one who had converted it.

Appeal from District Court, Barnes county; *Glaspell, J.*

Action by Andrew Thurston against the Osborne-McMillan Elevator Company. Judgment for plaintiff. Defendant appeals. Reversed.

Lee Combs, for appellant.

To recover upon a seed lien, the plaintiff must show that the grain alleged to have been converted was grown by the person to whom he sold the seed, and upon the land described in his alleged seed lien. *Joslyn v. Smith*, 2 N. D. 53, 49 N. W. 382; *Martin v. Hawthorne*, 3 N. D. 412, 57 N. W. 87.

To admit prejudicial evidence with the understanding that it is to be stricken out unless the party offering it produces evidence rendering it competent, is reversible error unless the promised testimony is introduced. *Kneeland v. The Great Western Elevator Co.*, 9 N. D. 49, 81 N. W. 67; *Insurance Co. v. Rubin*, 97 Ill. 402; *Howe Machine Co. v. Rosine*, 87 Ill. 105; *Erben v. Lorrillard*, 19 N. Y. 302.

Where a tenant's contract stipulates that the title, ownership and possession is to remain in the landlord until a division thereof, mortgage by the tenant does not attach so as to warrant an action for a conversion by the mortgagee until such division. *Savings Bank v. Canfield*, 12 S. D. 330, 81 N. W. 630; *Omlie v. Farmers State Bank*, 8 N. D. 570, 80 N. W. 689. Tenant's interest does not attach until a division in such case. *Angell v. Egger*, 6

N. D. 391, 71 N. W. 547; *Bidgood v. Monarch Elevator Co.*, 9 N. D. 627, 84 N. W. 561; *Hawk v. Konouzki*, 10 N. D. 37, 84 N. W. 563.

Zuger & Paulson, for respondents.

The delivery of the note by Myhre to Thurston upon paying of the amount due thereon operated to transfer said note and security to Thurston. *Hill v. Alexander*, 41 Pac. 1066; 4 Am. & Eng. Enc. Law (2d Ed.) 252; 27 Am. & Eng. Enc. Law (2d Ed.) 209; 23 L. R. A. 124, and note.

A. E. Olson acquired title to the crop by his settlement with Robert Anderson, and the mortgage given by him attached when he so acquired such interest. Section 4680, Rev. Codes 1899; *Donovan v. St. Anthony & Dakota Elev. Co.*, 7 N. D. 313, 75 N. W. 809; *Grand Forks Nat'l Bank v. Minneapolis & Northern Elev. Co.*, 43 N. W. 806; *Merchants Nat'l Bank of Devils Lake v. Mann*, 2 N. D. 546, 51 N. W. 946; *Hostetter v. Brooks Elev. Co.*, 4 N. D. 357, 61 N. W. 49.

ENGERUD, J. Plaintiff seeks by this action to recover from the defendant elevator company damages for the alleged conversion of a quantity of wheat upon which the plaintiff claims a seed lien and four chattel mortgages. The answer of the defendant is a general denial, and also specifically denies that the plaintiff ever acquired any lien upon the grain in question, and further specifically denies that it converted the grain in question, or deprived the plaintiff thereof. The trial of the issues resulted in a verdict in favor of the plaintiff for the sum of \$272.30. A motion for a new trial having been denied, the defendant appeals.

The appellant assigns numerous errors based upon the rulings of the court admitting and rejecting evidence. The defendant also moved for a directed verdict on the ground that the evidence was insufficient to sustain a verdict for the plaintiff. The latter motion is based largely upon the same propositions of law involved in the alleged erroneous admission and exclusion of evidence. For that reason the consideration of the assignments based on the denial of defendant's motion for a directed verdict will dispose of the questions arising on the several assignments with relation to the rulings on evidence.

Although the plaintiff, in his complaint, relies upon a seed lien and four several chattel mortgages, at the trial he offered proof

only as to the seed lien and two of the chattel mortgages. The trial court held that the evidence was insufficient to establish the seed lien, and instructed the jury to disregard all evidence in relation to that lien, and submitted to the jury only the evidence with relation to the two chattel mortgages. The facts developed on the trial in relation to these two chattel mortgages were as follows: One Almira Olson and her husband, A. E. Olson, during the year 1902, were occupying and residing upon two quarter sections of land in Barnes county, which land was owned in fee by one Robert Anderson. The latter had on December 18, 1901, contracted to sell the land to Almira Olson on what is commonly known as the "crop payment plan." The contract was in writing, and provided that the vendee, Almira Olson, should occupy the land and farm it, and deliver one-half of the crop each year to the vendor until the full purchase price, with interest, was paid. Title to the entire crop was reserved in the vendor until a division. The contract further provided that it was nonassignable without the written consent of the vendor. On May 19, 1902, Almira Olson and her husband, A. E. Olson, made and delivered to one E. K. Myhre a chattel mortgage to secure a note dated on that day, payable to said Myhre, for \$133.28 and interest. The chattel mortgage covered all crops to be raised during the year 1902 on the land mentioned. This note was signed by the plaintiff as a surety, and when it matured the plaintiff was obliged to pay the balance due thereon, which then amounted to about \$90, and the note was turned over to him by the payee. On November 15, 1901, the husband, A. E. Olson, alone, executed and delivered to the plaintiff a note for \$417.07 and interest, and at the same time, to secure the same, executed a chattel mortgage upon certain personal property, including the crops to be grown during the year 1902 upon the land referred to. This note and mortgage were not signed by the wife, Almira Olson. Both mortgages were duly filed. A crop was raised by the Olsons upon the land in question during the year 1902, and in the latter part of October of that year they sold the grain to the defendant elevator company and absconded without paying the liens. Before the grain was sold, an arrangement was made between Anderson, the vendor of the land, and Mr. and Mrs. Olson, by which Anderson relinquished all right and title to the grain in consideration of the cancellation of the contract and the vacation of the premises by the Olsons. It does not appear, how-

ever, whether the grain was turned over to Mr. Olson or to Mrs. Olson. Nor is there any direct evidence tending to show that Mr. Olson had previously acquired any right to the crops on the land. The contract gave to Mrs. Olson alone the right to occupy and farm the land. Presumptively, therefore, she held whatever right to the crop was vested in the vendee by the contract; and, in the absence of any evidence to the contrary, we must presume that the relinquishment by Anderson of his claims under the contract left the entire title to the grain in Mrs. Olson. The fact that her husband lived with her on the farm, and devoted his time and labor to raising the crop, does not overcome the presumption of ownership by the wife. *Olson v. O'Connor*, 9 N. D. 504, 84 N. W. 359, 81 Am. St. Rép. 595. Under these circumstances, it was error to deny defendant's motion to withdraw from the consideration of the jury the note and mortgage executed by A. E. Olson alone, because there was no evidence to show that he ever had any title to the crop to which his mortgage could attach.

The appellant contends that, by reason of the terms of the contract between Robert Anderson and Mrs. Olson, there never was any title in Mrs. Olson to which her mortgage could attach; citing *Omlie v. Bank*, 8 N. D. 570, 80 N. W. 689, and similar cases. It is undisputed in this case that, before or at the time the first load of grain was hauled to the elevator, the vendor relinquished and surrendered all his rights in the grain to the vendee, thereby vesting the vendee with complete title. The mortgage, of course, attached as soon as the title vested.

Appellant further contended that plaintiff, because he signed the note ostensibly as maker, and subsequently paid it, without any express agreement at the time of payment or at any other time that the note and mortgage should be assigned to him, is not subrogated thereto. With respect to this contention, it is sufficient to say that the evidence clearly shows that the plaintiff was a mere surety on the note, and, under section 4661, Rev. Codes 1899, is entitled, upon payment thereof, to be subrogated to all the rights of the creditor. It is undisputed that he paid the sum of about \$90 in cash for the balance due on the note, and is clearly entitled to all the securities which the principal makers had given to secure the payment to that extent.

We think the evidence was sufficient to warrant a recovery to the extent of the amount due on the chattel mortgage signed by

Mr. and Mrs. Olson, and hence the motion for a directed verdict was properly denied. As the error above indicated requires a new trial, it is unnecessary to discuss the numerous other assignments of error.

The judgment is reversed and a new trial ordered. All concur.
(101 N. W. 892.)

IN RE JAMES T. SMITH'S ESTATE.

Opinion filed December 5, 1904.

Claims Against Decedent — Rejection.

1. Under the statutes of this state the rejection of a claim against the estate of a decedent, either by the executor, administrator, or county judge, is a condition precedent to the right to sue upon it.

Right of Action.

2. For the purpose of authorizing actions upon claims, and of limiting the time in which suit must be brought, the constructive rejection which, by section 6405, follows as a result of ten days' neglect or refusal to allow it, is equivalent to a rejection by written indorsement.

Allowance.

3. A claim may be approved and allowed by a county judge after it has been rejected either by nonaction or by written indorsement, at any time before it is barred by the special or general statute of limitations.

Appeal from District Court, Eddy county; *Glaspell, J.*

In the matter of the estate of James T. Smith, deceased. From a judgment reversing a judgment allowing a creditor's claim, he appeals.

Reversed.

P. M. Mattson, S. E. Elsworth and Tracy R. Bangs, for appellants.

James A. Manley, for respondents. *John Knauf*, for respondent, Kate Barstow.

YOUNG, C. J. This appeal was taken by a creditor of the estate of James T. Smith, deceased, from a judgment of the district court of Eddy county, which reversed and set aside a judgment of the county court of that county approving and allowing the appellants' claim of \$3,803.50 against said estate.

The record shows that the claim in question was presented to the administrator on February 28, 1903; that he indorsed his allowance thereof on March 9, 1903; that it was presented to the county judge on March 14, 1903, and was approved and allowed by him on May 1, 1903. The claim was allowed by the administrator within ten days after it was presented. The allowance by the county judge was more than ten days, but less than ninety days after its presentment.

The sole contention presented to the district court as ground for reversing the judgment of the county court was that the claim had been previously rejected by operation of section 6405, Rev. Codes 1899, because of the failure of the county judge to approve it within ten days after its presentation for allowance; that such rejection was irrevocable, and that the county judge had thereafter no legal authority to allow it. The trial court sustained this view, and this appeal involves the correctness of this conclusion.

We are of the opinion that this construction of the statute cannot be sustained. Section 6405, Rev. Codes 1899, which is relied upon, so far as pertinent reads as follows: "When a claim, accompanied by the affidavit required in this chapter, is presented to the executor or administrator, he must indorse thereon his allowance or rejection, with the day and date thereof. If he allows the claim, it must be presented to the county judge for his approval, who must, in the same manner, indorse upon it his allowance or rejection. If the executor or administrator, or the judge, refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect is equivalent to a rejection on the tenth day. * * *" The purpose and effect of this section is apparent when considered in connection with the following sections:

Section 6407: "When a claim is rejected, either by the executor or administrator, or the county judge, the holder must bring suit in the proper court, to wit: Before a justice of the peace, or in the district court, according to its amount, against the executor or administrator, within three months after the date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim is barred forever."

Section 6408: "No claim must be allowed by the executor or administrator, or by the judge, which is barred by the statute of limitations. * * * No holder of any claim against an estate

shall maintain an action thereon unless the claim is first presented to the executor or administrator. * * *

Section 6406: "Every claim allowed by the executor or administrator, and approved by the judge, * * * must be ranked among the acknowledged debts of the estate to be paid in due course of administration."

Section 6410: "A judgment rendered against an executor or administrator, in the district court or before a magistrate, upon any claim for money, * * * only establishes the claim in the same manner as if it had been allowed by the executor or administrator, and the judge of the county court, and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due."

Section 6405, *supra*, was before us for construction in *Boyd v. Von Neida*, 9 N. D. 337, 83 N. W. 329. We held that it was the purpose of that section to fix the time when claimants secure the right to sue upon their claims, and when they become barred under the special limitation prescribed by section 6407, and that for these purposes a rejection by nonaction is equivalent to an actual rejection by written indorsement. This conclusion was followed and approved in *Farwell v. Richardson*, 10 N. D. 34, 84 N. W. 558. In both cases a recovery was sought in the district court upon claims which had been duly presented for allowance, and upon which no action had been taken for more than three months. In both cases the defendant invoked section 6407, which requires suit to be brought within three months after the rejection of the claim, and this defense was sustained. The defendant prevailed, however, not because the claims had been rejected, but because the actions were not brought within ninety days from the rejection. The mere fact that a claim has been rejected is no defense in an action upon it. It is important only in setting the special statute of limitations in motion. A rejection by an administrator or executor and county judge never has, of itself, the effect of defeating a recovery in an action upon the claim. Indeed, the presentation to and rejection by one of them is essential to the right to sue. See section 6408, *supra*; also, *Lichtenberg v. McGlynn*, 105 Cal. 45, 38 Pac. 541; *Barthe v. Rogers*, 127 Cal. 52, 59 Pac. 310. The original jurisdiction to allow or reject claims rests in the executor or administrator and county judge, and it is only after a rejection by one of them that the right to maintain an action in

the district court arises, and when it does arise it is in the nature of appellate, rather than original, jurisdiction. When a claim is allowed by the county judge, the allowance is in the nature of a judgment against the estate, to be paid by the executor or administrator in due course of administration. When a judgment is rendered upon a claim in an action, exactly the same result follows. A rejected claim may be sued upon at any time within three months after its rejection, and the executor or administrator be compelled to pay it in due course of administration. No reason is suggested why the administrator may not voluntarily do what he may be compelled to do. There is no statute which restricts his right to allow claims, other than that they must not be barred either by the special or general statute of limitations. The appellant's claim had, it is true, been constructively rejected, but it was not a barred claim when the county judge allowed it. Had it been rejected by written indorsement, the result would not be different, for there is no reason why the county judge cannot, in his discretion, set aside a previous rejection and allow a claim, provided, only, this is done before it is barred; and so the cases hold. *Husted v. Hoyt*, 12 Conn. 160; *Calanan v. McClure*, 47 Barb. (N. Y.) 206; *Burks v. Bennett*, 62 Tex. 277; *Gilespie v. Wright*, 93 Cal. 169, 28 Pac. 862.

Judgment reversed. All concur.

(100 N. W. 890.)

DOWAGIAC MANUFACTURING COMPANY, A CORPORATION, v. JOHN MAHON AND J. B. ROBINSON, COPARTNERS AS MAHON & ROBINSON.

Opinion filed December 6, 1904.

Sale — Warranty.

1. A written warranty that "it is understood that the goods are warranted only against breakage caused by manifest defects in material," etc., excludes all other warranties of quality, express or implied.

Sale by Sample.

2. Under a written contract of sale of machinery, specifying the terms and conditions of the contract, a sale by sample cannot be shown.

Action for Price — Counterclaim — Deceit.

3. An answer and counterclaim alleging that a written contract of sale of drills and disks provided that they were of proper pattern, and properly constructed to do the work intended for them in a certain locality where the vendees were engaged in business, which contract is alleged to have been entered into in reliance on such statements or representations fraudulently made, does not state a defense or counterclaim for fraud or deceit.

Damages — Waiver.

4. Section 4988, Rev. Codes 1899, prescribing the rule of damages upon failure to accept and pay for personal property, the title to which is not vested in the vendee, is not applicable as a rule of damages where the property has been delivered to the vendee. In the latter case the vendor may waive the provision as to title and elect to sue for the purchase price, and the bringing of an action for the purchase price is such a waiver.

Appeal from District Court, Pembina county; *Kneeshaw, J.*

Action by the Dowagiac Manufacturing Company against John Mahon and J. B. Robinson. From an order sustaining demurrer to the answer and counterclaim, defendants appeal.

Affirmed.

W. J. Burke and Scott Rex, for appellants.

If any one of three defenses alleged is good, demurrer should be overruled. *Flint v. Dulany*, 15 Pac. 208; *Pryse v. Bank*, 48 S. W. 415; *Lee v. Mehew*, 56 Pac. 1046; *Hill v. Walsh*, 61 N. W. 440.

Pleading is good not only as to express warranties, but entitled the defendant to defend as breach of warranties implied by law. *Hoe v. Sanborn*, 21 N. Y. 552; *Giffert v. West*, 37 Wis. 115. A contract is construed strictly against the party drawing it. Section 3912, Rev. Codes 1899; 17 Am. & Eng. Enc. Law 14; 9 Cyc. 590. The clause in question is not exclusive upon the subject of warranty, but is open to parol proof with the exception of the single feature, which the contract by a strict interpretation covers. *Charter Gas Engine Co. v. Kellam*, 79 N. Y. S. 1019.

No warranty will be implied where the parties have expressed in words the warranty by which they mean to be bound, but the rule does not extend to the exclusion of warranties implied by law where they are not excluded by the terms of the contract. *Blackmore v. Fairbanks, Morse & Co.*, 79 Ia. 282; 44 N. W.

548; *Bucy v. Pitts Agricultural Works*, 56 N. W. 541; *Merriam v. Field*, 24 Wis. 640; *Giffert v. West*, 37 Wis. 115; *Alpha Check Rower Co. v. Bradley*, 75 N. W. 369; *Houston Cotton Oil Co. v. Trammel*, 72 S. W. 244; *Carleton v. Lombard Ayres & Co.*, 149 N. Y. 137, 43 N. E. 422.

The fact that there is a written contract or conveyance will not prevent proof of false representations before or at the time of executing the same. 14 Am. & Eng. Enc. Law 29; *Jones on Evidence*, section 440; 2 Pom. Eq. Jur. (2d Ed.) 896; *Bigelow on Fraud*, 175; *Phelps v. James*, 44 N. W. 543; *Powelton Coal Co. v. McShain*, 75 Pa. St. 238; *Picard v. McCormick*, 11 Mich. 68; *Stanhope v. Swafford*, 45 N. W. 403; *Thomas v. Loose*, 114 Pa. St. 35, 6 Atl. 326; *Cullmans v. Lindsay*, 6 Atl. 332; *McCormick Harvesting Machine Co. v. Williams*, 68 N. W. 907; *Dowagiac Mfg. Co. v. Gibson*, 35 N. W. 603; *Griffith v. Strand*, 54 Pac. 613; *Nowlin v. Cain*, 3 Allen, 261; *Race v. Weston*, 86 Ill. 91; *Hoitt v. Holcomb*, 23 N. H. 535; *Mayer v. Dean*, 22 N. E. 261; 15 Am. & Eng. Enc. Law, 1251; *Carleton v. Lombard, Ayres & Co.*, 149 N. Y. 137, 43 N. E. 422.

The complaint does not state a cause of action. Although the demurrer was interposed by respondent, it relates back and searches the record. *Tribune Printing Co. v. Barnes*, 7 N. D. 591, 75 N. W. 904; *The Dowagiac Mfg. Co. v. White Rock Lumber & Hardware Co.*, 99 N. W. 854.

Newman, Spalding & Stambaugh, for respondents.

The execution of the contract superseded all the oral negotiations and stipulations concerning its matter, which preceded or accompanied the execution of the instrument. Section 3888, Rev. Codes; *Blossom v. Griffin*, 13 N. Y. 569; *Baker v. Higgins*, 21 N. Y. 397; *Hutchinson v. Cleary*, 3 N. D. 270, 55 N. W. 729; *Northwestern Fuel Co. v. Burns*, 1 N. D. 137, 45 N. W. 699; *Plano Mfg. Co. v. Root*, 3 N. D. 165, 54 N. W. 924; *Grand Forks Lumber Co. v. Tourtelot*, 7 N. D. 587, 75 N. W. 901; *Knudson v. Legion of Honor*, 7 S. D. 214, 63 N. W. 911; *Seitz v. Brewers Refrigerating Mach. Co.*, 141 U. S. 510, 12 Sup. Ct. Rep. 46; *DeWitt v. Berry*, 134 U. S. 306, 10 Sup. Ct. Rep. 538; *Baldwin v. Van Deusen*, 37 N. Y. 487.

To raise an implied warranty under a written contract of sale, the circumstances of the transaction raising such an implied war-

ranty must appear from the written contract. It is claimed that the sale was by sample and, therefore, an implied warranty exists which can be shown by parol. *Ottawa Bottle Co. v. Gunther*, 31 Fed. 208; *Whittemore v. South Boston Co.*, 2 Allen 52; 1 Am. & Eng. Enc. Law (1st Ed.) 110.

An express warranty of quality, excludes all implied warranties of quality. *Reynolds v. Palmer*, 21 Fed. 533; 10 Am. & Eng. Enc. Law (1st Ed.) 109; *Baldwin v. Van Deusen*, 37 N. Y. 487; *DeWitt v. Berry*, 134 U. S. 306; 33 L. Ed. 896; 10 Sup. Ct. Rep. 538; *Lanier v. Auld*, 3 Am. Dec. 680; 28 Am. & Eng. Enc. Law (1st Ed.) 742; *International Pavement Co. v. Smith*, 17 Mo. App. 264; *Johnson v. Latimer*, 71 Ga. 470; *Cosgrove v. Bennett*, 32 Minn. 371, 20 N. W. 359; *Shepherd v. Gilroy*, 46 Ia. 193; *McGraw v. Fletcher*, 35 Mich. 104.

The same transaction cannot be characterized as a warranty and as a fraud at the same time. *Rose v. Hurley*, 39 Ind. 81. Such issues cannot be tried in the same action. *Graves v. Waite*, 59 N. Y. 156; *Ross v. Mather*, 51 N. Y. 108. Representations of value and utility of machines and the like are mere matter of opinion. *Neideder v. Castain*, 36 Am. Rep. 198; *Hunter v. McLaughlin*, 43 Ind. 38; 1 Bigelow on Fraud, 479; *Esterly Harvesting Machine Co. v. Berg*, 71 N. W. 952.

Upon the proposition that the plaintiff could not elect to take the property under the title clause of the contract or sue for the price, the case of *Dowagiac Mfg. Co. v. White Rock Lumber Co.*, 99 N. W. 854 (S. D.), stands alone. The authorities are uniform to the contrary. See *Shepard v. Mills*, 50 N. E. 709; *Tanner & Delaney Co. v. Hall*, 7 So. 187; *Merchants & Planters Bank v. Thomas*, 6 S. W. 565; *Campbell Mfg. Co. v. Hickok*, 21 Atl. 363; *Alden v. Dyer*, 99 N. W. 784; 6 Am. & Eng. Enc. Law (2d Ed.) 480.

Some cases hold vendor may sue for the contract price and hold title as security for the payment of the judgment. *Fuller v. Brown*, 60 N. W. 980; *Prettyplace v. Groton Bridge & Mfg. Co.*, 61 N. W. 266; *Perkins v. Grobben*, 74 N. W. 469; *Campbell Co. v. Rockaway Co.*, 29 Atl. 681; *Brewer v. Ford*, 7 N. Y. Supp. 244.

MORGAN, C. J. The plaintiff brings this action to recover from the defendants the sum of \$825.30, claimed to be due to it on account of disks and drills alleged to have been sold and delivered to the defendants under a written contract. This contract provided

that plaintiff authorized the defendants "to sell the grain seeding machinery manufactured" by it, at Neche, N. D., and all territory tributary thereto. The plaintiff also therein agreed to appoint "no other agent for said territory." Defendants therein agreed "to purchase of said Dowagiac Manufacturing Company grain drills and seeders of its manufacture to supply their entire trade, * * * at prices shown by printed list on reverse side of this contract." The contract also provided for settlements on May 1st, by giving notes payable in November, and for discounts if paid before that time. The contract also contained the following stipulations: (1) "In all cases the title and ownership of goods covered by this contract shall remain and be vested in the party of the first part until sold by the party of the second part in regular course of business, or settled for as above, and all receipts arising from the sale of these goods shall belong exclusively and absolutely to the party of the first part until settlement is completed according to the terms of this contract." (2) "It is understood the goods are warranted only against breakage caused by manifest defect in material for the year in which they are sold." The defendant interposed an answer and a counterclaim for damages. The answer alleges: (1) That the machines were sold by sample, and that those furnished under the contract were not made according to the samples, and were faulty in construction, and not equal and like the samples as they were warranted to be. (2) That the machines were warranted to be merchantable. (3) That they were expressly warranted to be of "proper pattern and construction," and "would properly and satisfactorily do the work for which they were intended in the territory tributary to Neche, N. D., * * * where it was contemplated they should sell the same." The plaintiff demurred to the answer and counterclaim upon the grounds that the new matter pleaded in such answer and counterclaim does not state facts sufficient to constitute a defense or counterclaim. The trial court sustained the demurrer, and defendants appeal from the order sustaining the same.

The answer alleges as a defense: (1) Breach of express warranties; (2) breach of implied warranties; (3) fraudulent representations which induced defendants to enter into the contract, and damages resulting from such fraudulent representations. Judgment is also prayed for that the contract be declared rescinded on account of such fraudulent representations and total failure of

consideration. Plaintiff contends that the defendants are entitled to claim only such warranty as is contained in the contract; that the parties have stipulated that no warranty is thereby given, except as to breakage caused by manifest defects in the materials; and that the use of the word "only" in the warranty necessarily excludes all other warranties. We agree with this contention. Giving the word "only" its ordinary meaning, and applying it in its restrictive sense, as qualifying the word to which it naturally belongs, the conclusion cannot be escaped that it restricts the meaning to be given to the verb "warranted." Defendants claim that it limits the time during which the warranty shall apply to the year in which the drills were sold. If that be true, its use was unnecessary, as without it the warranty would be effective for that year only. Before the sentence can mean what is claimed for it by defendants, the word "only" must be transposed to another place. There is nothing to warrant such a change of place. Under the natural grammatical construction of the sentence, it limits the application of the word "warranted." To construe it as limiting any other word would be a strained construction of the sentence. When read in its natural sense, the contract provides for a limited warranty of the goods sold. The contract having restricted the warranty intended to be made, all others that pertain to the same subject-matter are excluded. The written contract is controlling. Its terms cannot be now changed by the addition of other warranties relating to the quality of the goods. Rev. Codes 1899, section 3888; *Hutchinson v. Cleary*, 3 N. D. 270, 55 N. W. 729; *Plano Mfg. Co. v. Root*, 3 N. D. 165, 54 N. W. 924; *Grand Forks Lumber Co. v. Tourtelot*, 7 N. D. 587, 75 N. W. 901; *Mechem on Sales*, section 1254; *Bank v. Prior*, 10 N. D. 146, 86 N. W. 362; *Bank v. Ruettell*, 12 N. D. 519, 97 N. W. 583.

The defendants contend that they are entitled to the benefit of warranties implied by law, notwithstanding the contract contains an express warranty against breakage caused by defective materials. They insist that such warranties as the law implies in relation to the fitness of the machines for the purposes intended, that they were merchantable goods, and that they were the equal of the samples exhibited, are properly pleaded, and that they are entitled to the benefit of such warranties in this case. In the first place, the written contract of sale does not show that the sale was made from a sample exhibited. To permit defendants to now show that the

contract was made with reference to a sample would be to vary the terms of a written contract, and this is not permissible in such cases. *Wiener v. Whipple*, 53 Wis. 298, 10 N. W. 433, 40 Am. Rep. 775. In the next place, all the implied warranties pleaded are excluded from the terms of the contract by its restrictive words. The goods were warranted only against breakage caused by manifest defects of materials. This clause limits the warranties to that one, and by its very terms excludes all others as to quality, whether express or implied. The law will not imply a warranty in favor of a party who has expressly stipulated that a specified warranty only is given. *Mechem on Sales*, section 1296, lays down the rule as follows: "Implied warranties can ordinarily arise only where the parties have not themselves created an express warranty relating to the same subject-matter, though this, as has been seen, is not an inflexible rule, and will yield to evidence that the parties intended both to operate, as where the express is clearly described to be in addition to that which the law alone would imply." In *Giffert v. West*, 37 Wis. 115, it was said: "Undoubtedly, as was held on the former appeal, an express warranty, in such a case, may be so framed as to restrict all warranty to the thing expressly warranted, and to exclude all warranty otherwise implied by law." In *Blackmore v. Fairbank Co. (Iowa)*, 44 N. W. 548, it was said: "A warranty will not be implied in conflict with the express terms of the agreement." The language of the warranty clause of this contract is so clear and unambiguous that we have no hesitation in holding that it excludes, by its own terms, all other warranties of quality, either express or implied. Properly construed, the contract is to the effect that plaintiff refused to warrant the machines, except as to breakage from one cause. *Lynch v. Curfman*, 65 Minn. 170, 68 N. W. 5.

Defendants also claim that they were induced to enter into the contract by false and fraudulent representations of plaintiff, made with intent to deceive and mislead them. The allegations of the answer in respect to this alleged defense are as follows: "That plaintiff then and there, in order to induce defendant to sign such written contract, represented and stated to them that the disks and drills * * * which were manufactured by plaintiff were of a proper pattern and design, and were properly constructed, and that they would properly and satisfactorily do the work for which they were intended in the territory tributary to Neche, N. D., where

defendants were located, and where it was contemplated that they should sell the same, and that they were merchantable and the best in the market, all of which statements and representations were false and untrue, and all of which statements and representations were made with intent * * * thereby to deceive and mislead defendants and induce them to sign said written contract, and that defendants were deceived and misled thereby, and signed said written contract in reliance upon such statements and representations, and not otherwise. * * * That from time to time, relying on the statements and representations so fraudulently made to them, and under which they signed said written contract, defendants ordered and received of plaintiff * * * said disks," and "have been damaged by the fraud and deceit of plaintiff in the sum of \$650 and upwards." Defendants claim that this constitutes a false and fraudulent representation of a material fact; that it vitiates the contract, and entitles them to a rescission of the contract and damages. It is not to be disputed that fraudulent representations of a fact will, under certain conditions, entitle the purchaser to annul the contract. It is difficult to construe this allegation of the answer as a statement of an existing or past fact. It wholly relates to the future so far as the working of the drills is concerned. So far as their construction is concerned, they are represented as properly constructed to work in a certain locality. What is proper construction of an article to do proper work in a particular locality is a matter of opinion concerning which men of equal judgment may well differ. There was no statement of a substantive fact respecting the construction of the machines. The statement was commendation, and an opinion as to its construction and use in one locality that will not sustain an annulment of the contract as a fraudulent representation of a fact. Bigelow on Fraud, p. 479; Hunter v. McLaughlin, 43 Ind. 38; Neidefer v. Chastain, 71 Ind. 363, 36 Am. Rep. 198. There are cases sustaining cancellation of contracts entered into in reliance on opinions. But the parties were not dealing as equals, or one of them was induced to forbear making inquiry as to the facts. The party injured was not the equal of the other mentally or in experience, or placed confidence in such opinion as coming from one who was his superior, and one in whom he had special confidence. There is nothing in this record showing such a state of facts. The defendants were dealers in these machines, or like ones, and had been for years. Defendants

had equal facilities and ability with the plaintiffs for determining whether these machines would work properly and were properly constructed to do the work intended for them in the vicinity of Neche, N. D. See *Chrysler v. Canaday*, 90 N. Y. 272, 43 Am. Rep. 166; *Medbury v. Watson*, 6 Metc. (Mass.) 246, 39 Am. Dec. 726; *Gordon v. Parmelee et al.*, 2 Allen 212; *Wren v. Moncure*, 95 Va. 369, 28 S. E. 588; *Lee v. McClelland*, 120 Cal. 147, 52 Pac. 300; *Cyc.*, vol. 9, p. 416, and cases cited. The statement that the machines were the best in the market, as a ground for avoiding the contract, is disposed of on the same reasons. It is not a statement of a fact, but a matter of pure opinion and praise. *Esterly Harvesting Machine Co. v. Berg* (Neb.), 71 N. W. 952.

Finally, it is claimed that the complaint does not state a cause of action, and that plaintiff's demurrer to the answer relates back to the complaint, and is available to the defendants to test its sufficiency. The defect claimed is that the proper measure of damages is not claimed; that, the title to the machines having been retained by the plaintiff, he cannot recover for the purchase price, but is only entitled to damages as prescribed by section 4988, Rev. Codes 1899. As we construe that section, it has no application to the facts of this case. Here the title was retained by the plaintiff for his own benefit, for security purposes solely. There had been a delivery of the machines to the defendants, and defendants had sold some of them. The plaintiff had the right to waive the security clause of the contract, and by commencing an action for the purchase price of the machines did waive it. As we construe section 4988, it applies to cases where there has been a refusal to accept the property purchased, or in cases where no delivery has followed the sale. At all events, the plaintiff may elect to claim damages in this case the same as though there had been an unconditional sale and delivery of the property. Plaintiff might have taken another remedy, but such other remedy is not exclusive. The following cases sustain this doctrine: *Alden v. Dyer* (Minn.) 99 N. W. 784; *Campbell Mfg. Co. v. Hickok* (Pa.) 21 Atl. 362; *Shepard v. Mills* (Ill.) 50 N. E. 709; *Smith v. Barber* (Ind. Sup.) 53 N. E. 1014; *Cooper v. Cleghorn*, 50 Wis. 113, 6 N. W. 491.

The order sustaining the demurrer is sustained. All concur.
(101 N. W. 903.)

WILLIAM S. LAUDER v. EVAN M. JONES.

Opinion filed December 7, 1904.

When Language Claimed to Be Libelous Is Susceptible of Two Constructions, the Jury Are to Determine Whether Used in an Innocent or Defamatory Sense.

1. Where the language of an alleged libel is fairly susceptible of a construction which renders it defamatory, and therefore actionable, even though it is also susceptible of a construction which would render it innocent, the complaint states a cause of action, and it is for the jury to determine whether the words were used in an innocent or defamatory sense.

Defamatory Charge Need Not Be Made in Direct Terms — Not Less Actionable if Made Indirectly.

2. It is not necessary, to render words defamatory and actionable, that they shall make the defamatory charge in direct terms. It may be made indirectly, and is not, for that reason, the less actionable.

What Constitutes Libel.

3. Under the statute of this state (section 2715, Rev. Codes 1899), every false and unprivileged publication by writing, "which exposes any person to hatred, contempt, ridicule or obloquy or which causes him to be shunned and avoided * * *" is libelous and actionable.

Matter in Issue Held Libelous.

4. The alleged libelous publication involved in this case is in the form of an affidavit purporting to have been made by one Wendall of and concerning the plaintiff in his judicial capacity, and published by the defendant by delivering copies thereof to divers persons. A copy of the affidavit is set out in full in the opinion. *Held*, that said writing is defamatory and actionable in this: That (1) it directly charges the plaintiff with a willful refusal to perform a legal duty, and indirectly charges that such refusal was from corrupt motives; (2) it fairly charges the plaintiff with betraying confidential communications to an alleged criminal for the purpose of shielding him; and (3) by insinuation it charges that the plaintiff was privy to a corrupt agreement, whereby, for a money consideration, protection was extended to law violators.

Under Section 5289 Truth and Mitigating Circumstances May Be Pleaded.

5. Under section 5289, Rev. Codes 1899, the defendant in a libel case is authorized to plead, as a complete defense, the truth of the matter charged to be defamatory; and also to plead any mitigating circumstances to reduce the amount of damages, "and whether he

prove the justification or not he may give in evidence the mitigating circumstances."

Truth of Alleged Defamatory Matter and Mitigation Must Be Pleaded.

6. The truth of the alleged defamatory matter, as well as facts in mitigation, are new matter, and, to be available as a defense under section 5289, Rev. Codes 1899, must be pleaded in the answer.

Unless Pleaded, Truth of Alleged Defamatory Matter and Mitigation Cannot Be Proven.

7. It was not error, therefore, for the trial court in this case, there being no answer by way of justification or in mitigation, to exclude evidence offered to prove the truth of the statements contained in the libelous affidavit.

Damages Not Excessive.

8. This case is one where punitive as well as compensatory damages are allowable, and the question of the amount is peculiarly within the province of the jury. We are unable to say that the amount of the award, \$7,000, is so large that it shows that the jury acted under the influence of passion and prejudice.

ON REHEARING.

Malice Essential to Recovery — Damages — Privileged Communication.

9. Malice, either express or implied, is essential to a recovery in all actions for defamation. When a defamatory charge is made upon an unprivileged occasion, the law implies malice for the purpose of sustaining the action and the recovery of compensatory damages, but when the occasion is privileged, the publication is presumed to have been made in good faith, and the burden is on the plaintiff to prove that it was made with actual malice.

Former Utterances on Same Subject Matter, But Not a Distinct Calumny, May Be Offered to Prove Malice.

10. For the purpose of showing actual malice in publishing a libel, the plaintiff may prove that prior to the commencement of the action defendant published the same words, or similar words relating to the same subject matter, and imputing the same general charge as that sued upon, but may not introduce evidence which merely tends to show general malice, or to show the publication of a distinct calumny.

Matter Uttered in Judicial Proceedings Privileged.

11. The testimony of a witness in a judicial proceeding, which is pertinent to the issues, cannot be made the subject of an action for defamation. The occasion is privileged, and the exemption of the witness for liability for his words is absolute.

Good Faith Presumed in Privileged Utterances.

12. The occasion being privileged, the law presumes that the statements of the witness are made in good faith and without malice.

Evidence.

13. "As bearing upon the question of the malice of the defendant in publishing the libel," which is the subject of this action, the plaintiff introduced in evidence at the trial of this case, over defendant's objection, a certain affidavit which the defendant had previously made in a proceeding in this court, the substance of which is set forth in the opinion. *Held* error, for two reasons: (1) The statements contained in it do not relate to the subject matter of the alleged libel; (2) having been made upon a privileged occasion, they are presumed to have been made in good faith. Further, its admission was highly prejudicial, for which a new trial must be granted.

Truth of Privileged Defamatory Statement Must Be Alleged.

14. The falsity of a defamatory charge is always presumed, and the defendant who relies upon the truth as a defense must plead it, and this is true as to defamatory statements made upon privileged occasions.

Appeal from District Court, Richland county; *Cowan, J.*

Action by William S. Lauder against Evan S. Jones. Judgment for plaintiff, and defendant appeals.

Reversed on rehearing.

Charles E. Wolfe and *Guy C. H. Corliss*, for appellant.

The office of the inducement is to set out the circumstances, and of the colloquium to show that the words were spoken with reference thereto. Townshend on Slander and Libel, sections 335, 336, 337; *Sturtevant v. Root*, 27 N. H. 69; *Com. v. Child*, 13 Pick. 198; 13 Enc. Pl. & Pr. 49-54 and 32-36.

The defendant must have made a defamatory charge to render himself liable, and it is not sufficient that persons hearing or reading the statement of facts, from which a good or bad inference might be drawn, see fit to draw a prejudicial one. *Simons v. Burnham*, 60 N. W. 476; *Brettun v. Anthony*, 103 Mass. 37; *Goodrich v. Hooper*, 97 Mass. 1; *York v. Johnson*, 116 Mass. 482; *Young v. Cook*, 144 Mass. 38, 10 N. E. 719; *Boss v. Tobey*, 2 Pick. 320; *Jones v. Diver*, 22 Ind. 184; *McFadin v. David*, 78 Ind. 445.

In every instance where it has been held that defendant slandered the plaintiff by indirection, the words, in the light of the circumstances, conveyed the meaning of a derogatory charge, and not mere

statements of fact, consistent with plaintiff's upright conduct, but from which some minds might possibly draw a prejudicial inference. *Gorham v. Ivers*, 2 Wend. 534; *Simons v. Burnham*, 60 N. W. 476; *MacDonald v. Mail Printing Co.*, 32 Ont. Rep. 163; *Nevill v. Fine Art & General Ins. Co.*, L. P. App. Cases, 68.

When a man is a candidate for a public office, conferred by the election of the people, any elector may discuss his fitness for office, and truthfully communicate to other electors any facts within his knowledge concerning the candidate's character or conduct, and express his opinion thereon, so long as he states as facts only the truth and as opinion only honest belief; but the publication of falsehoods against the character of the candidate, as, for instance, charge imputing to him a criminal offense, whether the charges relate to the candidate's prior official conduct or not, does not come within the domain of a privileged communication. 18 Am. & Eng. Enc. Law, (2d Ed.) 1042; *Jarman v. Rea*, 70 Pac. 216; *Post Pub. Co. v. Hallam*, 59 Fed. 530.

It is always competent, in the interests of the defendant, for the court to decide, in a proper case, that the words are not defamatory, and refuse to submit the question to the jury. *Capital & Counties Bank v. Henty & Sons*, 8 App. Cas. 741; *Heller v. Pulitzer*, 153 Mo. 213, 54 S. W. 459.

It is not the intention of the speaker or writer or the understanding of any particular hearer or reader that is to determine the actionable quality of the words. 18 Am. & Eng. Enc. Law (2d Ed.) 977; *Snell v. Snow*, 13 Metc. 278; *Gribble v. Pioneer Press Co.* 37 Minn. 277, 34 N. W. 30; *Callahan v. Ingran*, 122 Mo. 355; *Pittsburgh, etc., R. Co. v. McCurdy*, 144 Pa. 544; *Thompson v. Lewiston Daily Sun Pub. Co.*, 91 Me. 203; *Reid v. Providence Journal Co.*, 20 R. I. 120.

W. H. Redmon, Purcell & Bradley, J. A. Dwyer and F. M. Nye, of counsel, for respondent.

Even though writings do not charge crime and would not be libelous if spoken, they are libelous if tending to expose any persons to public hatred, contempt, ridicule, aversion or disgrace, or to bring them into obloquy, or which reflect upon their character, or lower them in public estimation. Rev. Codes, 2715; *Townshend on Slander and Libel*, 76-77; *Newell on Libel and Slander*, 32, 3-4-5; *St. James Military Academy v. Gaiser*, 28 L. R. A. 667;

Weston v. Grand Rapids Pub. Co., 87 N. W. 258; Culmer v. Canby et al., 101 Fed. 195; White v. Nicholls, 3 How. 266, 11 L. Ed. 591; Davis v. Hamilton, 88 N. W. 744; State v. Shippman, 86 N. W. 431; Schenk v. Schenk, 20 N. J. Laws, 208; Dixon v. Allen, 11 Pac. 179; Bettner v. Holt, 11 Pac. 713; Landing v. Carpenter et al., 9 Wis. 540; Stewart v. Minn. Tribune Co., 41 N. W. 457; Allen v. News Pub. Co. 50 N. W. 1093; Buckstaff v. Viall, 54 N. W. 111; Schomberg v. Walker, 64 Pac. 290; Byram v. Aikin, 67 N. W. 807; Bradley v. Cramer, 59 Wis. 309, 18 N. W. 268; Cary v. Allen, 39 Wis. 481; Bergman v. Jones, 94 N. Y. 51; Shattuck v. McArthur, 25 Fed. 133.

Courts will construe a libelous publication in its ordinary and popular sense. Hotchkiss v. Olmstead, 37 Ind. 74; Com. v. Child, 30 Mass. 205; Newell on Libel and Slander, section 31, page 264; section 42, page 268; World Pub. Co. v. Mullen, 61 N. W. 108; Simons v. Burnham, 60 N. W. 476; Ewing v. Ainger, 55 N. W. 996; Pokrok Zapadu Pub. Co. v. Ziskovsky, 60 N. W. 358; Post Pub. Co. v. Hallan, 59 Fed. 530; Truman v. Taylor, 4 Ia. 424; Bradley v. Cramer, 59 Wis. 309, 18 N. W. 268; Bettner v. Holt, 11 Pac. 713.

Insinuations by expressing belief or opinions are as libelous as though the charge was made direct. Waters v. Jones, 29 Am. Dec. 261; Nye v. Otis, 8 Mass. 132; Simmons v. Holster, 13 Minn. 249; Bee Pub. Co. v. Shields, 94 N. W. 1029; Republican Pub. Co. v. Miner, 34 Pac. 485; Brewer v. Chase, 80 N. W. 575; Funk v. Beverly, 112 Ind. 190, 13 N. E. 573.

It is immaterial that the defendant did not mean to libel the plaintiff. Taylor v. Hearst, 40 Pac. 392; McAllister v. Detroit Press Co., 43 N. W. 431; Whiting v. Carpenter, 93 N. W. 926; Berry v. Massey, 104 Ind. 486, 3 N. E. 942; McKinley v. Robinson, 20 Johns, 351; Massuere v. Dickens, 34 N. W. 349; Curtis v. Mussey, 6 Gray, 291; Wynne v. Parsons, 57 Conn. 73.

To entitle the defendant to prove the truth of the charge as a defense, the specific facts upon which it rests must be pleaded. The answer must be as broad as the charge, so that the plaintiff may know exactly what he has to meet. Fry v. Bennett, 5 Sandf. (N. Y.) 69; Newell on Libel and Slander, 651-656; Townshend on Slander and Libel, 352-362; 13 Enc. Pl. & Pr. 81 to 87; 32 Century Digest, 2167; VanNess v. Hamilton, 19 Johns, 349; Fidler v. Delevan, 20 Wend. 57; Billings v. Waller, 28 How. Pr. 97; Fenster-

maker v. Tribune Pub. Co. 43 Pac. 112; 31 Am. Rep. 757; Amos v. Stockert, 34 S. E. 821; Summer v. Brewyn, 52 Ind. 140; Knott v. Stoddart, 38 Vt. 25; Thrall v. Smiley, 9 Cal. 529; Williams v. Fuller, 94 N. W. 118.

In an action for libel, evidence of the truth of the publication can be received only when the defendant in his answer has set up the truth of the publication as a defense. Newell on Libel and Slander, 790; Sheehan v. Collins, 71 Am. Dec. 271; Sweeney v. Baker, 13 W. Va. 158; 31 Am. Rep. 757; Burke v. Mascarich, 22 Pac. 673; 13 Enc. Pl. & Pr. 78, 75 and 79; Reiley v. Timme, 53 Wis. 64, 10 N. W. 5; Wilson v. Noonan, 35 Wis. 322; Langton v. Hagerty, 35 Wis. 150.

When no justification is pleaded, the falsity of the slander or libel is admitted, and its falsity need not be proved. Burke v. Mascarich, 22 Pac. 673; Jones v. Townshend, 58 Am. Rep. 676, 21 Fla. 431; Shehan v. Collins, 20 Ill. 325, 71 Am. Dec. 271; Pokrok Zapadu Pub. Co. v. Ziskovsky, 60 N. W. 358; Hartranft v. Hesser, 34 Pa. 117; Continental Nat. Bank v. Bowdre, 92 Tenn. 723, 23 S. W. 131; Cooley on Torts, 207; Republican Pub. Co. v. Miner, 20 Pac. 345.

It is for the court to decide whether a publication is capable of the meaning ascribed to it by the innuendo, and for the jury to decide whether such meaning is truly ascribed. 13 Enc. Pl. & Pr. 55; Ayres v. Toulmin, 41 N. W. 855; Royce v. Maloney, 58 Vt. 437, 5 Atl. 395; Singer v. Bender, 64 Wis. 169, 24 N. W. 903; Price v. Conway, 104 Pa. St. 340; Newell on Libel and Slander, section 34, pages 618, 619 and 629; Krause v. The Sentinel Co., 19 N. W. 384; Newell on Libel and Slander, 603, 609.

The term colloquium signifies an averment that there was a conversation or discourse on the part of the defendant which connects the slander with the plaintiff, his office, profession or trade. Newell on Slander and Libel, 613; Starkey on Slander, 209; Stoll v. Houde, 34 Minn. 193, 25 N. W. 63; Section 5288, Rev. Codes 1899.

While the proposition that publications concerning a candidate for public office and public officers are privileged, as against the proposition, see the following: Bronson v. Bruce, 26 N. W. 671; Wheaton v. Beecher, 33 N. W. 503; Belknap v. Ball, 47 N. W. 674; Smith v. Burrus, 13 L. R. A. 59; Mattice v. Wilcox, 147 N. Y. 652, 42 N. E. 270; Upton v. Hume, 33 Pac. 810; Bailey v. Kalamazoo Pub. Co., 40 Mich. 251; Burke v. Mascarich, 22 Pac.

673; *Jones v. Townshend*, 58 Am. Rep. 214; *Eikhoff v. Gilbert*, 83 N. W. 110, 51 L. R. A. 451; *Banner Pub. Co. v. State*, 57 Am. Rep. 214; *Coffin v. Brown*, 55 L. R. A. 732; *Bee Pub. Co. v. Shields*, 94 N. W. 1029.

It was not error to permit plaintiff to testify: "I am a married man and have a family." In an action for slander or libel it is proper, as bearing on the question of damages for plaintiff to show his whole environment, domestic, social, professional or business. *Enquirer Co. v. Johnson*, 72 Fed. 443; *Rhodes v. Naglee*, 6 Pac. 863; *Dixon v. Allen*, 11 Pac. 179; *Cahill v. Murphy*, 30 Pac. 195; *Barnes v. Campbell*, 60 N. H. 27; *Enos v. Enos*, 135 N. Y. 609, 32 N. E. 123; *Klumph v. Dunn*, 66 Pa. 141, 5 Am. Rep. 355; *Suth. on Dam.* p. 259, section 1210; *Id.* p. 2599, section 1214; *Bolton v. O'Brien*, 16 L. R. Ir., 97, 110.

The damages were not excessive. *Maclean v. Scripps*, 52 Mich. 214; *Maloy v. Bennett*, 15 Fed. 371; *Pame v. Rouss*, 61 N. Y. S. 705.

To be privileged, a publication must be made in good faith and upon probable cause. *Hebner v. Gt. Northern Ry. Co.*, 80 N. W. 1128; *Printing & Pub. Co. v. Schuck*, 98 Fed. 925; *Smedley v. Soule*, 84 N. W. 63; *Davis v. Wells*, 60 S. W. 566.

A communication, though privileged, will be actionable if actuated by express or actual malice. *White v. Nicholls*, 44 U. S. (3 How.) 266, 11 L. Ed. 591; *Elam v. Badger*, 23 Ill. 498; *Cook v. Hill*, 5 N. Y. Sup. Ct. 341; *Carpenter v. Bailey*, 53 N. H. 590; *Blumhardt v. Rohr*, 70 Md. 328; *Newell on Libel and Slander*, 480, 505, 535; *Bradley v. Heath*, 12 Pick. 163.

Under the Code, and in some jurisdictions under a special statute, privilege must be especially pleaded. 13 Enc. Pl. & Pr. 88; *Hess v. Sparks*, 44 Kan. 470, 25 Pac. 580; *Goodwin v. Daniels*, 7 Allen. 61; *Comerford v. West End St. Ry. Co.* 164 Mass. 15, 41 N. E. 59; *Fresh v. Cutter*, 73 Md. 87.

ON REHEARING.

Chas. E. Wolfe and *Guy C. H. Corliss*, for appellant.

Privileged communications which cannot themselves form the basis of an action for slander are not admissible for the purpose of showing malice in other communications. *Shinglemeyer v. Wright*, 50 L. R. A. 129; *Throckmorton v. Evening Post Pub. Co.*, 35 N. Y. App. Div. 396.

The affidavit filed in the Supreme Court by the defendant Jones in another action was inadmissible. Without attempting to prove its falsity or without any evidence that it was maliciously made, and against the presumption that, as a witness he was acting truthfully and in good faith, the affidavit was admitted as proof of malice on the part of the defendant Jones. Such proof is privileged and inadmissible, and the privilege is absolute. *Hinickel v Vonlif*, 69 Md. 179, 14 Atl. 500, 17 Atl. 1056; 9 Am. St. Rep. 413; *Hoor v. Wood*, 3 Metc. 193; *Liles v. Garter* 42 Oh. St. 631, *Hutchinson v. Lewis*, 75 Ind. 55; *Jacobs v. Cater*, 92 N. W. 397; *Scougale v. Sweet*, 82 N. W. 1061.

Where a publication qualifiedly privileged is admitted by the defendant in a libel suit, the burden of proof is on the plaintiff to show not only the falsity but the malice of the publication. *Gattis v. Kilgo*, 38 S. E. 931; *Hume v. Kusche*, 87 N. Y. Supp. 109; *Edwards v. Chandler*, 14 Mich. 471.

W. H. Redmon, J. A. Dwyer, Purcell & Bradley, and F. M. Nye, for respondent.

The only protection that a witness has is, that an action of slander or libel cannot be maintained against him founded on his testimony. *Davis v. Starrett*, 97 Me. 568; 55 Atl. 516.

Anything defendant ever said or did with reference to the plaintiff may be urged as evidence of malice. It is difficult to say what possible evidence is inadmissible on this issue. *Newell on Slander and Libel*, section 41, p. 336; 18 Am. & Eng. Enc. Law (2d Ed.) 1019; *Whittemore v. Weiss*, 32 Mich. 348; *Price v. Eastwood*, 45 Ia. 640.

Separate publications made concerning plaintiff, which are not themselves actionable, are admissible in a suit for libel. If they are not actionable, it seems that they are still admissible whenever the question of malice in fact is to be left to the jury. *McDermott v. Evening Journal*, 43 N. J. Law, 488; *Ransom v. McCurley*, 31 N. E. 119; *Preston v. Prey*, 27 Pac. 533; *Ellis v. Whitehead*, 54 N. W. 752; *Fowles v. Bowen*, 30 N. Y. 20.

Where the defendant shows circumstances that furnish occasion for a privileged communication, the plaintiff may rely upon the presumption of the falsity of the charge made against him, and if he shows actual malice and want of good faith in the defendant, he need not assume the burden of proving the falsity. 18 Am. & Eng.

Enc. Law (2d Ed.) 1049; *Atwater v. Morning News Co.*, 34 Atl. 865; *Newell on Slander and Libel*, 325; *Billet v. Times Dem. Pub. Co.*, 50 L. R. A. 62.

YOUNG, C. J. Action for libel. The jury returned a verdict for \$7,000 in plaintiff's favor. Defendant made a motion for new trial. This appeal is from the order overruling the same. The motion for new trial was made on a statement of case in which defendant specified 110 alleged errors as grounds for the motion. The same errors, and all of them, are assigned in appellant's brief as grounds for reversing the order appealed from. Only a portion of them, however, are supported in the body of his brief "with reasons and authorities," as required by rule 14 of this court (91 N. W. viii), and are therefore deemed to have been abandoned. The alleged defamatory writing is in the form of an affidavit, which purports to have been made by one Elmer L. Wendall. The plaintiff claims that the defendant published this affidavit by exhibiting it, and by delivering copies thereof, personally and by mail, to divers persons. A copy of the affidavit is set out in the complaint, and in a number of innuendos the plaintiff places his interpretation upon the alleged defamatory publication.

The complaint alleges that the plaintiff is now and for more than twenty-one years has been a resident of Richland county in this state, and that during the last twelve years he has been and now is the district judge of the Fourth Judicial District; that in the months of April, May, June and July, 1902, the defendant, with intent to injure the plaintiff in his good name and fame as a man and citizen, and as a judge, wickedly and maliciously wrote, printed and published, and caused to be written, printed and published, of and concerning the plaintiff, the following false, malicious, defamatory and unprivileged libel, to wit (for the sake of brevity the innuendoes are omitted):

"This is a copy of affidavit sent to Rev. F. Frank Hunter of Fairmount, N. D., by the Rev. E. L. Wendall, of Montrose, S. D., with the request that it be published. Refer to either of these gentlemen. 'State of South Dakota, County of McCook—ss. Personally appeared before me, W. B. Phelps, a notary public of the state of South Dakota, residence in the county of McCook, in the village of Montrose, in said state of South Dakota, the undersigned deponent, Elmer Lincoln Wendall, personally known to me as a resident of said village of Montrose, in said county of McCook,

in said state of South Dakota, on this 11th day of April, in the year of 1902, and deposeth as follows: On the 17th day of April, in the year of our Lord 1900, I was transferred by Bishop C. C. McCabe, of the Methodist Episcopal church, from the Illinois conference of the said church, and on the 19th day of April Bishop McCabe appointed me to the pastorate of the Methodist Episcopal church at Lidgerwood, North Dakota, and at the close of the conference I proceeded to the field which the bishop had appointed me, where I had been acting as pastor for nearly two months previous to said appointment. At this time there were at least ten places in the village of Lidgerwood that were commonly reported to be places where liquor was sold in defiance of the laws of the state of North Dakota. One of the most notorious of these resorts was conducted in the block of wooden buildings situated on Main street of the village, known as the "Maxwell block," and said to be the property of one Ralph Maxwell. During the summer of 1900 I collected a sum of money amounting to something like sixty dollars from the business men of Lidgerwood. All of whom were asked to contribute did so. They contributed with the understanding that I was not to reveal their names, and I have kept that pledge sacredly ever since. The State Enforcement League sent a detective by the name of Edwards to Lidgerwood, and this man worked up evidence against seven different places located in the village of Lidgerwood in the county of Richland and state of North Dakota. These places were the places in Maxwell's block on Main street; the house of ill fame conducted by Maxwell west of town in his pasture; the creamery conducted by Ralph Maxwell in the northwestern part of the town near the track of the Minneapolis, Sault Ste. Marie R. R.; the drug store conducted by Mat Londa, and the Columbia restaurant by Mrs. Ingebred Berg. All of these places were conducted on Main street except the house of ill fame and the creamery. The said Edwards, after purchasing intoxicants at all of the above-mentioned places, proceeded to the city of Wahpeton, in said county of Richland and state of North Dakota, and in the presence of competent judicial officers swore out search warrants, describing accurately the location of the premises to be searched, and also made affidavit to the fact that he had obtained or procured intoxicating liquors on the above described premises. [Innuendo.] These papers were placed in the hands of Daniel Jones, Esq., for service, who was at that time

deputy sheriff of Richland county, North Dakota. Soon after this the said Daniel Jones was taken sick with typhoid fever, and was for a period of six weeks unable to attend to any business whatever. On his recovery Mr. Jones made arrangements to serve the papers above mentioned. On or about the 15th day of November, 1900, the said Daniel Jones, Esq., in the city of Ellendale, in the county of Dickey, in the state of North Dakota, did personally apply to Judge Lauder of that judicial district, for the purpose of obtaining his signature to the papers, which was necessary before they could be served. This application I have been assured by Mr. Jones was made in private, Mr. Guy Divet, who was at that time Judge Lauder's private secretary, being one of the three persons present. Judge Lauder refused to sign the papers, alleging that Mr. Jones was incompetent and untrustworthy. This interview occurred some time during the morning of, or about, the 15th day of November, 1900. I well remember that a large quantity of beer in kegs was removed from Maxwell's property on Main street to property not described in the papers on the afternoon of the same day that Daniel Jones made application to Judge Lauder to sign the papers. The removal of beer to property not described in the papers above mentioned, and therefore not subject to search, would defeat the prospect of the prospective raid. The inference that might be drawn from the above-mentioned facts are that some one must have informed Mr. Maxwell that the papers were out, describing his property and calling for a search of said property. The Sunday afternoon after the above-mentioned removal of the beer, the above-mentioned house of ill fame, situated as above described, caught fire in a mysterious manner, and was entirely destroyed. The beer at the cold storage plant in the creamery was removed in the night to a cellar of another dwelling owned by Maxwell on some other property not described in the above-mentioned papers. [Innuendo.] When I learned that Judge William Lauder, of the Fourth Judicial District, had refused to sign the papers above mentioned, I wrote a letter to his honor, calling his attention to the fact that under the law and statute he had no discretion in the matter, but must sign such papers when presented. Judge William Lauder replied to this without squarely meeting the issue. His honor had a great deal to say about the bad morals of the family of which the above-mentioned Jones is an honored member. His honor finally said that he would sign the pa-

pers if they were placed in the hands of some one in whom he (Lauder) could place confidence. [Innuendo.] About a week after I received this I was in the office of Joseph Morrow, a reputable lumber dealer in the village of Lidgerwood. The said Joseph Morrow, Esq., told me in confidence that Mr. Maxwell had called him into his (Maxwell's) office, and had exhibited to the astonished gaze of said Joseph Morrow an exact verbatim copy of my private and confidential letter to Judge William Lauder above mentioned. Mr. Joseph Morrow made this statement to warn me that the above-mentioned Ralph Maxwell had a most complete system for obtaining the information necessary for the protection of his business. [Innuendo.] I at once returned to my house and sat down at my study table and wrote a letter to Judge William Lauder above mentioned, and called his honor's attention to the fact that a man of integrity, a democrat in politics, had seen in Ralph Maxwell's possession a verbatim copy of a private letter written to his honor. I told his honor that I could not believe that he (Lauder) was such a reprobate guilty of such an act of treachery as the above-mentioned statement personally related to me by the above-mentioned Joseph Morrow would imply, but that I feared that some person was betraying his (Lauder's) confidence. I waited one week for a reply to this letter and none came. Then I wrote to Judge William Lauder again, and told him that if he did not reply to this second letter in a reasonable time that I would publish the above-mentioned statement in one of the county papers. This threat was effective, and Judge Lauder, above mentioned, replied to the letter, saying that he knew nothing about Ralph Maxwell having in his possession a private letter which I, the undersigned deponent, had addressed to him, Judge William Lauder. The denial was a rather weak affair, in my opinion. Mr. Joseph Morrow, above-mentioned, afterwards assured me that he saw in Ralph Maxwell's office in his block in the city of Lidgerwood an exact and verbatim copy of my second letter to Judge William Lauder, above mentioned. In the first week in January, I, the undersigned deponent, met the said Judge William Lauder on the train while on my way to Aberdeen, South Dakota. The judge introduced himself to me, and seemed quite anxious to explain away the above-mentioned circumstances. [Innuendo.] About this time it was commonly reported in Lidgerwood that Ralph Maxwell was paying Guy Divet, who was at that time Judge William Lauder's

private secretary, the sum of \$600 per annum. At the same time and place Ralph Maxwell was loudly boasting to his friends that he paid the sum of \$4,000 per year for protection, and that he (Maxwell) got what he paid for. [Innuendo.] I, the undersigned deponent, believe the above to be a true and correct account of the matter therein contained, to the best of my memory and ability. And further deponent saith not. Elmer Lincoln Wendall. Subscribed and sworn to before me this 11th day of April, A. D. 1902. W. B. Phelps, Notary Public.' "

The defamatory meaning ascribed by plaintiff in the several innuendoes to the language of the affidavit, so far as necessary to refer to the same, is, in substance: That the plaintiff in his capacity as judge "unlawfully and corruptly refused to sign papers which it was his official duty to sign, and wrongfully, unlawfully and corruptly informed said Ralph Maxwell and other persons whose property was described in the papers that actions affecting their property had been, or were about to be, commenced, with the intent that the said Maxwell and others might have an opportunity to remove from their property any intoxicating liquors which were, or might be, upon said premises, and thus defeat the purpose of the prospective raid;" that the plaintiff, as judge, "for the purpose of aiding said Ralph Maxwell in carrying on the business of selling intoxicating liquors contrary to law, * * * unlawfully and corruptly furnished copies of private and confidential letters written by the said Wendall to the plaintiff;" and that Maxwell paid to Arthur G. Divet, court stenographer, the sum of \$600 per annum for the purpose of keeping informed as to prosecutions, and that plaintiff was in a corrupt manner privy thereto; that said Maxwell paid yearly the sum of \$4,000 for immunity, and that plaintiff received said money for granting immunity to said Maxwell.

On September 11, 1902, the defendant served and filed his answer, consisting of: (1) A general denial; (2) an express denial that he wrote the alleged libelous affidavit, "or published it, or any article of similar character or import in any manner whatever to any person whomsoever;" (3) An admission that plaintiff is a citizen of Richland county and district judge of the Fourth Judicial District, and an allegation upon information and belief "that at the times mentioned in the complaint he was an avowed candidate for and openly soliciting the support of the electors of Richland county and elsewhere for their votes and support in securing his

nomination and election to the position of Justice of the Supreme Court of the state of North Dakota; * * * that during all of said time this defendant was an elector within said Richland county; that by reason of all the premises the publication of the article aforesaid to and among said electors as aforesaid was and is a privileged communication; * * * (4) an allegation upon information and belief that the alleged libelous affidavit was composed and published by one Elmer L. Wendall; that the publication was made solely by enclosing said article in sealed envelopes addressed to the individual electors; that this was done by said Wendall in good faith, without intent to charge or be understood as charging the plaintiff with any corrupt or unlawful act or refusal to act, or any official misconduct of any kind whatever, and solely for the purpose of placing before the electors of said Richland county and elsewhere in the state of North Dakota the facts stated in said article, and with the full belief on his part that the statements in said article, each and all, were true, without exception or qualification; (5) an allegation "upon information and belief that each and all of the statements contained in the article so written, composed, printed, and published by said Wendall, as aforesaid, and which is set forth in said complaint as aforesaid, were and are absolutely true, and this he will maintain by competent proof upon the trial."

On October 6, 1902, an order was made, after a hearing, striking out all of the allegations of the answer relative to Wendall's good faith and purpose in composing and publishing the affidavit (paragraph 4, *supra*) as irrelevant and redundant matter," and requiring the defendant to make more definite and certain that part of his answer in which he alleges the truth of the facts stated in the alleged libelous affidavit (paragraph 5, *supra*), for the reason, as assigned in the order, that "this part of the answer, being in the nature of a plea in justification, the allegations that the alleged libel is true must be as broad as the charge contained in the libel as set forth in the complaint, and the answer must set forth specific facts showing the libel to be true in that sense." Defendant was given ten days from the date of the service of this order in which to serve a new answer in conformity thereto. The defendant did not serve or file an amended answer within the period fixed by the court, or at any other time, and the case went to trial on February 17, 1903, upon the answer originally served, as modified

by the order hereinbefore referred to; that is, upon (1) a general denial; (2) a specific denial of the composition or publication of the alleged libel; and (3) an allegation that the publication was privileged. The motion attacking the answer was made to the Honorable C. J. Fisk, Judge of the First Judicial District. Honorable John F. Cowan, of the Second Judicial District, presided at the trial and heard and denied the motion for new trial.

The first and chief contention of appellant's counsel is that "the complaint does not state a cause of action for the reason that the alleged libel is not susceptible of a defamatory meaning, and there are no allegations in the way of inducement or colloquium to give the words any defamatory meaning." Counsel are correct as to the absence of the inducement and colloquium. The complaint alleges no extrinsic facts or circumstances for the purpose of affecting the construction and meaning of the words as they appear in the affidavit. The defamatory character of the affidavit must, therefore, be determined from the language employed in it, according to its natural and accepted meaning, regardless of the defamatory meaning which the plaintiff has ascribed to it in the innuendoes; for it goes without saying that it is not the function of a mere innuendo to enlarge, extend or change the natural sense or meaning of the alleged defamatory words. Counsel for appellant contend that, "In order to constitute defamation, it must appear that the defendant has made a defamatory charge against the plaintiff; it is not sufficient that he has stated facts from which an inference against the plaintiff may be drawn; that the words contained in the article published do not embody any defamatory charge against the plaintiff; that every statement in the article is compatible with the plaintiff's judicial integrity; that it is not stated that the judge declined to sign the order from corrupt motives, or that he furnished Maxwell with information of the proceedings in order that Maxwell might remove his liquor from the place, or that he furnished him with any information at all; and that the statements in the affidavit are all entirely consistent with the utmost integrity of the plaintiff in his judicial office, for the refusal to sign the papers might easily be a legitimate refusal, and Maxwell might easily have received his information from other sources, and copies of the letters written to Lauder by Wendall might have reached Maxwell without plaintiff's knowledge." The decisive question upon the objection that the complaint does not

state a cause of action is this: Is the language of the affidavit, standing alone, fairly susceptible of a defamatory meaning? If it is, then the complaint states a cause of action, and the case was properly submitted to the jury, for it is well settled that where the language of an alleged libel is fairly susceptible of a construction which renders it defamatory, and therefore actionable, even though it is also susceptible of a construction which would render it innocent, the complaint states a cause of action, good as against demurrer, and it is for the jury to determine whether the words were used in an innocent or defamatory sense. *Newell on Slander and Libel*, 281; *Wesley v. Bennett*, 5 Abb. Prac. 498; *Patch v. Tribune Co.*, 38 Hun, 368; *Rundell v. Butler*, 7 Barb. 260; *Sanderson v. Caldwell*, 45 N. Y. 398, 6 Am. Rep. 105; *Van Vactor v. Walkup*, 46 Cal. 124; *Bergmann v. Jones*, 94 N. Y. 64; *Atkinson v. Detroit Free Press*, 46 Mich. 374, 9 N. W. 501; *Blakeman v. Blakeman*, 31 Minn. 398, 18 N. W. 103; *Thompson v. Powning*, 15 Nev. 212; *State v. Spear*, 13 R. I. 327; *Dexter v. Taber*, 12 Johns. 239; *Goodrich v. Woolcott*, 3 Cow. 240; *Byrnes v. Mathews*, 12 N. Y. St. Rep. 74; *Hays v. Brierly*, 4 Watts, 392; *State v. Smily*, 37 Ohio St. 30, 41 Am. Rep. 487; *Pfitzinger v. Dubs*, 64 Fed. 697, 12 C. C. A. 399. In the case last cited the court properly states that "it is only when the words are incapable of a construction injurious to the plaintiff's character that the court is justified in taking the case from the jury."

Likewise it is well settled that it is not necessary, to render words defamatory and actionable, that they shall make a defamatory charge in direct terms. It may be made indirectly, by insinuation, by sarcasm, or by mere questions, as well as by direct assertion in positive terms, and it is not less actionable because made indirectly; and it matters not how artful or disguised the modes in which the meaning is concealed, if it is in fact defamatory. So, too, "a man may slander or libel another as effectually by circulating rumors or reports, or by putting his communication, spoken or written, in the shape of a hearsay, as by making distinct assertions of the slanderous matter and giving them out as true within his own knowledge, or for the accuracy of which he pledges his own veracity." *Schenck v. Schenck*, 20 N. J. Law, 208; *Gorham v. Ives*, 2 Wend. 536; *McCoy v. Lightner*, 2 Watts, 352; *Hotchkiss v. Oliphant*, 2 Hill, 510; *Rundell v. Butler*, 7 Barb. 260; *Gibson v. Williams*, 4 Wend. 320; *Andrews v. Woodmansee*,

15 Wend. 232; *Solverson v. Peterson*, 64 Wis. 198, 25 N. W. 14, 54 Am. Rep. 607; *Buckstaff v. Viall*, 84 Wis. 129, 54 N. W. 111; *Allen v. News Publishing Co.*, 81 Wis. 121, 50 N. W. 1093; *Goodrich v. Woolcott*, 3 Cow. 231; *Comm. v. Child*, 13 Pick. 198; *Wilson v. Noonan*, 23 Wis. 105; *Kennedy v. Gifford*, 19 Wend. 296; *Adams v. Lawson*, 17 Grat. 250, 94 Am. Dec. 455; *Townshed on Slander and Libel* (4th Ed.) sections 164, 169; *Newell on Slander and Libel* (2d Ed.) 264-268. It is well said in *Comm. v. Child*, *supra*, that, "if, in truth, language is published and circulated with intent to slander and 'defame others, though such intent is artfully concealed by the use of ambiguous, technical or conventional terms, or cant phrases, or any of the other thousand forms in which malice attempts to disguise itself, still, if it really does mean and import the defamatory character attributed to it, it shall not escape legal animadversion and punishment if rightfully and properly charged."

We may now inquire whether the alleged libelous publication is fairly susceptible of a defamatory meaning. If it is, then it will be conceded that its publication is actionable, for, both at common law and under the statute, every person has the right of protection from defamation, whether effected by oral or written publications. Our statute (section 2715, Rev. Codes 1899) defines libel, and this is merely the common-law definition, as follows: "Libel is a false and unprivileged publication by writing, printing, picture, effigy or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Does the language of the writing here in question impute to the plaintiff acts or conduct which would expose him to hatred, or contempt, or ridicule, or obloquy, or cause him to be shunned and avoided? If it can be said to fairly impute to him acts or conduct which would naturally be followed by the consequences named, it is libelous, and it was in that event, as we have seen, for the jury to determine whether that, or a possible innocent sense, was the true sense of the language. The proper rule for our guidance in determining this question is that announced by Lord Mansfield in *Peake v. Oldham*, 1 Cowp. 272, 273, and approved in *Goodrich v. Woolcott*, *supra*: "Where the words, from their general import, appear to have been spoken to defame a party, the court ought not to be industrious in putting a construction upon them different from what they bear in the common accep-

tation and meaning of them." In other words, it is the duty of the court to see what the rest of mankind sees, and to understand the meaning of the writing as the rest of mankind understands it, and to place itself in the position of an unbiased reader of ordinary intelligence, and thus determine the meaning which the language, considered in its natural and popular sense, was intended and calculated to convey." *Carter v. Andrews*, 16 Pick. 1; *Hotchkiss v. Olmstead*, 37 Ind. 74; *Comm. v. Child*, 13 Pick. 205; *World Publishing Company v. Mullen* (Neb.) 61 N. W. 108, 47 Am. St. Rep. 737; *Ayres v. Toulmin* (Mich.) 41 N. W. 855; *Spencer v. Southwick*, 11 Johns. 592; *Tillson v. Robbins*, 68 Me. 295, 28 Am. Rep. 50; *Townshend on Slander and Libel*, 177; *Newell on Slander and Libel*, sections 31, 42.

We cannot see how two minds can differ as to the defamatory character of this writing. In our opinion, the average reader would understand it as charging Judge Lauder with a want of personal and official integrity, and with the grossest kind of judicial corruption. Clearly that is the meaning which it is well calculated to convey to the common understanding. Not only can it be fairly said to impute corrupt acts and conduct to him, but it does more. By a carefully drawn narrative of evidential facts it practically removes the possibility of any other meaning being drawn from it. It is true, as counsel for appellant say, that all of the statements contained in the affidavit may be true in point of fact and still Judge Lauder be an honest and upright judge; that is, it may be that a satisfactory explanation could be given by him as to each of the facts stated, which would render them entirely compatible with his complete innocence. That possibility however, does not make the publication less libelous, for it will hardly be contended that to charge one with being a thief is not defamatory because the person accused is able to prove his innocence, or that to publish of another a narrative of facts which imputes to him the commission of a crime is not libelous, because, forsooth, he may be able to establish other and additional facts which clearly show that he is not guilty. Obviously, the defamatory character of a writing is to be determined from what it contains, and not by what is omitted from it. The writing here in question is significant in its narrative of incriminating facts and its total omission of exculpatory facts. It will be noted that the writing studiously fails to disclose any explanatory facts tending in any degree to

vindicate the personal or official integrity of the plaintiff, while, on the other hand, it imputes to him corrupt acts in his official capacity, and as to each exhibits a narrative of facts which, to the average reader, would be strong proof of his guilt. In our opinion, the alleged libelous affidavit directly charges the plaintiff with refusing to sign search warrants under circumstances which made his refusal a willful refusal to perform a legal duty in which he had no discretion, for the statute (section 7605, Rev. Codes 1899), as applied to the facts narrated in the affidavit, gave him no discretion; further, that it fairly charges that his refusal was for the corrupt purpose of enabling the persons named in the papers to protect their property and avoid the consequences of a search and seizure; further, that it fairly accuses the plaintiff with betraying confidential communications to an alleged criminal, with the corrupt purpose of shielding him from the legal consequences of his offenses; and by insinuation and indirect language, it imputes to the plaintiff a charge that in his judicial capacity he was privy to a corrupt arrangement whereby, for a money consideration, he extended protection to a person who is described as a notorious lawbreaker, and thus enabled him to continue in his unlawful business. To this extent the language of the affidavit fairly sustains the meaning ascribed to it in the plaintiff's inuendoes. It will be conceded that such acts and conduct would bring the plaintiff into contempt and obloquy, and cause him to be shunned and avoided by all fair-minded men. The complaint, therefore, states a cause of action, and the question as to whether the foregoing was the true meaning of the alleged defamatory publication was properly left with the jury. For illustrative publications which have been held libelous, see *Cooper v. Greeley*, 1 Denio 347; *Stone v. Cooper*, 2 Denio 293; *Steele v. Southwick*, 9 Johns 214, and cases cited.

Error is assigned upon the rulings of the court excluding certain evidence offered to prove the truth of the several statements which are set forth in the alleged libelous affidavit. In this no error was committed. Evidence tending to establish the truth of the statements which constitute the libelous charges was not admissible under the allegations of the answer, upon which the case was tried, and to have admitted such evidence would have been error. If the defendant suffered prejudice because he failed to get before the jury evidence tending to prove, either the truth of the defamatory

charges imputed by the affidavit, or the truth of the facts narrated in the affidavit independent of any defamatory meaning, the fault does not lie in any erroneous ruling of the trial court excluding it, but in his own failure and persistent refusal to file an answer under which such evidence could legally be admitted. It is true, in actions for libel, the truth is a complete defense, but the rule is as old as the law of libel that in order to be proved it must first be pleaded, and that the pleading in justification must be as broad as the defamatory charge. This rule is manifestly just, for when a defendant justifies a publication by pleading the truth of the defamatory charge therein contained, he assumes the position of an accuser, and the plaintiff is in the position of one accused. It is altogether just, therefore, that the defendant should be required to inform the plaintiff in his answer of the exact nature and scope of his accusation, to the end that the plaintiff may be prepared to meet them. It is generally held that not only is a defendant precluded from offering evidence to prove the truth of the alleged libel, in the absence of an answer sufficiently alleging the truth of the libelous charge, but that he may not offer evidence which tends to establish the truth of the statements constituting the libelous charge even upon the question of malice and for the purpose of mitigating damages, except upon a like sufficient answer. At common law, the truth was a complete defense, as it is under the statute; but, if the evidence of the defendant fell short of entirely establishing it, he ran the risk on the one hand of having the damages enhanced by his reiteration of the libelous charge, and, on the other, he was not permitted to avail himself of a partial proof of the facts constituting the libel for the purpose of mitigating damages: that is, for the purpose of rebutting malice and showing an innocent motive in the publication. The protest against this highly unjust rule resulted in the preparation by the Code commissioners of the state of New York and the subsequent adoption by that state of section 165 of the Code of Procedure, which reads as follows: "In the actions mentioned in the last section [actions for libel and slander] the defendant may in his answer allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages, and whether he prove the justification or not he may give in evidence the mitigating circumstances." This section of the New York statutes and the one preceding it were adopted literally by the territorial legislature,

and have been in force in this jurisdiction since 1877. Sections 5288, 5289, Rev. Codes 1899. They were also adopted in California (sections 460 and 461, Cal. Code Civ. Proc.), also in Wisconsin (sections 2677 and 2678, Wis. St. [Sanborn & Berryman's]), and in a number of other states. The change wrought by the section above quoted is accurately set forth in section 360 of Bliss on Code Pleading (2d Ed.) as follows: "This section, with the preceding one, was copied in the practice codes of other states, and its full force will be appreciated by bearing in mind the previous New York ruling, against which it was directed. Theretofore, in that state, 'the defense of an action of libel or slander was a very perilous undertaking. If the defendant attempted to justify by proving the truth of the words spoken, it was regarded as a reiteration of the charge, and conclusive evidence of malice; and no evidence in mitigation could be received. If he failed to establish the truth of the charge, the damages were aggravated. He might give evidence in mitigation; but in that case he must admit the falsity of the charge, and could give no evidence tending to prove the contrary.' This section permits the defendant to seek to establish the truth of the alleged defamatory matter, and at the same time to show extenuating circumstances which would reduce the damages, and to show the latter, although he fail in the justification. It destroys the artificial deduction of malice, allows all the circumstances to be brought before the court and jury, and makes the malice and its extent questions of fact to be drawn from all the evidence. The forcible reasoning which justified the old ruling—that a plea of justification, if untrue, was but an aggravation of the original wrong—still has its full effect when it is not made in good faith; and it is accordingly held that if the defendant justifies when he does not believe, and has no reason to believe, the words to be true, his answer may be treated as showing continued and express malice, and should aggravate the damages. The New York courts have given full effect to this section by permitting all pertinent facts to be shown in mitigating, although they tend to prove the truth of the alleged defamatory matter, as, when the defendant had charged the plaintiff with keeping a house of ill fame, he was permitted to allege and prove that the plaintiff's wife and daughter had been guilty of such lascivious and improper conduct as to induce him to believe that he kept such a house; and when defendant had charged the plaintiff with being a thief, and having stolen

from him, he was permitted to plead and prove such wrongful carrying away of corn and appropriation to his own use as did not amount to larceny, although so supposed when he made the charge; and when a defendant had charged the plaintiff with swearing to a lie, and, in attempting to justify, had failed to make out a charge of perjury, the answer was held sufficient to admit evidence in mitigation of damages. * * * The holding in New York is uniform that a defendant may not only justify and plead in mitigation—the statute is express upon that—but also that he may rely upon facts in mitigation which tend to justify.” The following authorities sustain the foregoing text: *Spooner v. Keeler*, 51 N. Y. 527; *Chamberlin v. Vance*, 51 Cal. 75; *Bush v. Prosser*, 11 N. Y. 354; *Quinn v. Scott*, 22 Minn. 456; *Distin v. Rose*, 69 N. Y. 122; *Bisbey v. Shaw*, 12 N. Y. 67; *Bennett v. Matthews*, 64 Barb. 410; *Bissell v. Press Pub. Co.*, 62 Hun, 551, 17 N. Y. Supp. 393; also *Kennedy v. Holborn*, 16 Wis. 457. The common-law rule, which required a justification to be pleaded, remains unchanged. A defendant who relies upon the truth of the defamatory matter is still under the necessity of pleading it. The law presumes the plaintiff is innocent of the defamatory acts with which he is charged, and “his guilt is new matter of defense, to be pleaded by way of confession and avoidance, and the pleading is subject to the rules that govern the statement of affirmative matter in other cases.” See Bliss on Code Pleading, section 361, and cases cited. So, too, it has been held that facts in mitigation are new matter, and, under this statute, must be set out in the answer. Bliss on Code Pleading, section 363. This is the rule in New York under the statute previously quoted. In *Willover v. Hill*, 72 N. Y. 36, it was said, that “in actions of this description, circumstances in mitigation must be set up in the answer in order to be admissible. Code, section 165; *Spooner v. Keeler*, 51 N. Y. 527; *Bush v. Prosser*, 11 N. Y. 347; *Bisbey v. Shaw*, 12 N. Y. 67; *Wachter v. Quenzer*, 29 N. Y. 547.” *Knox v. Commercial Agency*, 2 N. Y. St. Rep. 85; *Moore v. Bank (Sup.)*, 4 N. Y. Supp. 378. So, also, it was held in Wisconsin, in *Wilson v. Noonan*, 35 Wis. 321, under the same statute, that in actions for slander and libel mitigating circumstances cannot, in general, be given in evidence under a general denial, but must be specially pleaded. See, also, *Langton v. Hagerty*, 35 Wis. 161; *Eviston v. Cramer*, 54 Wis. 220, 11 N. W. 556; *Reiley v. Timme*, 53 Wis. 63, 10 N. W. 5; *Adamson v.*

Raymer, 94 Wis. 243, 68 N. W. 1000; *Buckley v. Knapp*, 48 Mo. 152. In this case it is unnecessary to go further than to hold that evidence tending to establish the facts which constitute the defamatory charge, and thus tend to establish the truth of the charge itself, is admissible only when offered under an answer properly alleging the mitigating facts and circumstances which it is proposed to establish. To this extent the authorities are uniform; and the reason of the rule which thus requires that facts tending to establish the truth of the charge shall be pleaded when offered in mitigation of damages is the same as that which requires it to be pleaded when offered in complete justification. That this is the rule both at common law and under the statute, see *Jarnigan v. Fleming*, 43 Miss. 710, 5 Am. Rep. 514; *Smith v. Smith*, 39 Pa. 441; *Knight v. Foster*, 39 N. H. 576; *Pallet v. Sargent*, 36 N. H. 499; *Dame v. Kenney*, 25 N. H. 321; *Smart v. Blanchard*, 42 N. H. 137; *Snyder v. Andrews*, 6 Barb. 43; *Stanley v. Webb*, 21 Barb. 148; *Stees v. Kemble*, 27 Pa. 112; *Blanchard v. Tulip*, 32 Hun, 638; *Willover v. Hill*, 72 N. Y. 36; *Hatfield v. Lasher*, 81 N. Y. 250; *Langton v. Hagerty*, 35 Wis. 150; *Henson v. Veatch*, 1 Blackf. 369; *Teagle v. Deboy*, 8 Blackf. 134; *Kelley v. Dillon*, 5 Ind. 426; *Tilson v. Clark*, 45 Barb. 178; *Sheahan v. Collins*, 20 Ill. 326, 71 Am. Dec. 271; *Thomas v. Dunaway*, 30 Ill. 373; *Swift v. Dickerman*, 31 Conn. 285; *Newell on Slander and Libel* (2d Ed.) section 790; *Hewitt v. Pioneer Press Co.*, 23 Minn. 178, 23 Am. Rep. 680; *Townshend on Slander and Libel* (4th Ed.) section 409. But see *Huson v. Dale*, 19 Mich. 17, 2 Am. Rep. 66, and *Simons v. Burnham* (Mich.) 60 N. W. 476. It is entirely clear, therefore, that the defendant, not having answered either by way of justification or by way of mitigation, had no legal right to submit to the jury evidence to prove the truth of the libelous charges imputed by the affidavit. Notwithstanding this, and in the absence of a sufficient answer, the record shows that the defendant was permitted, without objection by the plaintiff, to testify fully as to the truth of all of the facts narrated in the affidavit which were within his knowledge, and to his belief in the truth of the same, as bearing upon his good faith in publishing the affidavit.

Counsel for appellant urge in their brief that the order requiring the defendant to make that part of his answer more definite and certain which alleged that each and all of the facts stated in the affidavit were absolutely true was erroneous. That question is

not before us for review. The order referred to directed the defendant to serve and file an answer conforming to the order within ten days thereafter. This, as we have seen, was not done. The defendant did not appeal or attempt to appeal from the order. He did not specify it as one of the 110 errors urged as grounds for a new trial. It is not assigned as error upon this appeal, and, inasmuch as it was not presented to the trial court as an error upon the motion for new trial, it could not be assigned as error for the first time in this court. But we are entirely agreed that if the question was properly before us, it would not avail the defendant. If the portion of the answer which was held bad had any proper place in the answer it must have been either as a plea in justification or a plea in mitigation. It is not contended that it was sufficient or was intended as a plea in justification. Defendant's counsel repeatedly and emphatically disclaim that it was interposed as a plea in justification, and assert that at no time has the defendant claimed, or did he desire, to plead that the plaintiff was guilty of the corrupt acts which are imputed to him by the affidavit as interpreted by his innuendoes. Neither can it be contended that the allegation in question is sufficient as a plea in mitigation. It merely alleges that each and all of the facts stated in the affidavit are absolutely true. It does not allege that the defendant had knowledge of these facts when he made the publication and that it was made in the belief of their truth. The answer was, therefore, entirely insufficient as an answer in mitigation; for it is well settled that "in pleading circumstances which are claimed to be proper for mitigation of damages, for the reason that they induced the defendant to believe that the charge made by him, complained of by the plaintiff, was true, the fact of such belief, and that it was so induced, is an essential one and should be distinctly alleged. * * * Where such an answer undertakes to set up that the charge was made in a belief of its truth, it must allege not only circumstances tending to produce such belief, but also the fact that such belief, so produced, existed in the mind of the defendant when he made the charge." *Gorton v. Keeler*, 51 Barb. 475; *Dolevin v. Wilder*, 34 How. Prac. 488; *Hatfield v. Lasher*, 17 Hun, 23; *Bennett v. Matthews*, 64 Barb. 410; *Townshend on Slander and Libel* (4th Ed.) section 361.

The jury awarded damages in the sum of \$7,000. One of the grounds urged for a new trial was "excessive damages appearing to have been given under the influence of passion and prejudice."

The case is one where punitive, as well as compensatory, damages are allowable, and the question of the amount was peculiarly within the province of the jury. We are unable to say, after a careful consideration of the evidence, that the amount awarded shows that the jury acted under the influence of passion or prejudice.

The conclusions announced cover the questions chiefly relied upon by the defendant.

We are of opinion that the defendant was accorded all of his legal rights under the answer upon which he elected to go to trial, and that no error appears upon the record.

The order appealed from will therefore be affirmed. All concur.

GLASPELL, J., of the Fifth Judicial District, sitting in place of COCHRANE, J.

ON REHEARING.

YOUNG, C. J. A rehearing was ordered in this case upon a number of assignments which were not considered in the foregoing opinion. The questions raised by them have now been fully presented.

The first, and it is a controlling question, relates to the admission in evidence, over defendant's objection, of a certain affidavit made by the defendant, which is known in the record as "Exhibit E." Inasmuch as we have reached the conclusion that the admission of this exhibit was prejudicial error, it will be necessary to set forth the circumstances of its execution and its general character, to the end that the reasons for our conclusion may clearly appear. In 1901 one Joseph Gunn, who was a party to an action in the district court of Richland county over which the plaintiff presides, filed an affidavit of prejudice against the plaintiff, pursuant to the provisions of section 5454a, Rev. Codes 1899, authorizing that procedure, and demanded that the plaintiff arrange for the attendance of another judge to try his case. He was represented in the action by McCumber, Bogart & Forbes, a firm of attorneys of which P. J. McCumber was the leading member. On July 18, 1901, Gunn, through his attorney, P. J. McCumber, and upon the latter's affidavit, caused an alternative writ of mandamus to issue out of this court to compel the plaintiff to comply with the statute above referred to and arrange for another judge. The plaintiff alleged that the affidavit of prejudice had not been made and filed in good

faith, and also alleged that it, as well as a number of similar affidavits which had been filed in other cases, had been made solely at the instigation of P. J. McCumber, and purely from motives of personal and political hostility to the plaintiff, and for the purpose of injuring and discrediting him; that in fact he was not prejudiced or biased in any respect, and had always accorded to litigants represented by said firm of McCumber, Bogart & Forbes all of their legal rights, and extended to them every courtesy possible in their cases. To contradict this and in support of his affidavit of prejudice, Gunn filed in evidence an affidavit of the defendant Jones, which is the affidavit in question. It is of considerable length, and its substance only need be stated. In it the defendant testified that he had been sheriff of Richland county for four years, and as such had ample opportunity to observe the plaintiff's conduct and attitude in the trial of cases. From the knowledge thus acquired, as well as from personal conversation with the plaintiff, he testified to a personal and political hatred on the part of the plaintiff toward P. J. McCumber, so intense in its character that it was visited upon the other members of the firm of which said McCumber was a member, upon the political friends of said McCumber and upon those who became clients of his firm. He further testified that he had been a party to a large number of actions; that when he was represented by the firm of which said McCumber was a member he invariably filed affidavits of prejudice; that when he was represented by other attorneys he filed no affidavits. The affidavit does not charge the plaintiff with personal or official dishonesty or corruption either directly or indirectly, by imputation or otherwise, and no such issue was involved in the proceedings before this court. The entire scope of the testimony given by the defendant in this affidavit is to charge the plaintiff with an intense prejudice against the said P. J. McCumber, and this it does in strong language. This affidavit was offered by the plaintiff and received by the court expressly "for the purpose of showing the state of feeling of the defendant toward the plaintiff, * * *" and "as bearing upon the question of the malice of the defendant in publishing the libel." It was objected to by counsel for defendant upon a number of grounds, and particularly upon the ground that it "has no tendency to show any personal malice, or any malice that would render the matter published actionable. * * *" and "as not tending to show any such malice as would

make a defendant liable for publishing a privileged communication. * * *

The existence of malice, either as a legal fiction or in fact, is essential to a recovery in every action for defamation. "Malice has always been divided into two kinds—implied malice, or malice in law, and express malice, or malice in fact. The first is shown by mere proof of the unauthorized use of the defamatory words charged. The second may be shown by the acts or conduct of the defendant immediately accompanying the utterance of the words, or by the utterance at other times of other and similar defamatory words having reference to the subject-matter of the words charged." *Gambrill v. Schooley* (Md.) 52 Atl. 500, 508, 63 L. R. A. 427. When the defamatory charge is made upon an occasion which is not privileged, malice in law, or legal malice, is conclusively presumed for the purpose of sustaining the action and a recovery of actual damages, but no further. *Wrege v. Jones*, 13 N. D. 267, 100 N. W. 705. When it is made upon an occasion which the law deems privileged, legal malice is not thus inferred. *Bearce v. Bass*, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446. On the contrary, the law presumes that it is made in good faith and without malice, and in such cases proof of actual malice is essential to sustain the action even for compensatory damages. Evidence of malice is always admissible where punitive damages are claimed. The trial court held that the Wendall affidavit was published on a privileged occasion. Evidence of actual malice was therefore admissible for the twofold purpose—(1) to sustain the action, and (2) upon the question of punitive damages. The sole question is whether the Jones affidavit was admissible for that purpose. In our opinion, it was not, and for two wholly independent reasons. The general rule in actions for slander or libel is that, for the purpose of showing malice, "any action or language of the defendant (before suit brought), tending to prove malice on his part in respect to the particular publication complained of, as distinguished from general ill will, is competent." Under this rule it is competent to show that the defendant spoke or published words imputing the same general charge as that sued upon, although in different language. *Enos v. Enos*, 135 N. Y. 609, 32 N. E. 123; *Cruikshank v. Gordon*, 118 N. Y. 178, 23 N. E. 457; *Barker v. Prizer*, 150 Ind. 4, 48 N. E. 4; *Austin v. Remington*, 46 Conn. 116; *Kennedy v. Gifford*, 19 Wend. 295; *Thomas v. Croswell*, 7 Johns. 264, 5 Am. Dec. 269; *Larrabee v. Tribune Co.*,

36 Minn. 141, 30 N. W. 462; *Gribble v. Pioneer Press Co.*, 34 Minn. 342, 25 N. W. 710; *Fredrickson v. Johnson*, 60 Minn. 337, 62 N. W. 388. But this rule does not permit the introduction in evidence in such action of words spoken or published on another occasion and of a different nature from those sued upon, although they are offered entirely for the purpose of showing that the words charged were spoken with a malicious intent. *Finnerty v. Tipper*, 2 Campb. 72; *Howard v. Sexton*, 4 N. Y. 157; *Frazier v. McCloskey*, 60 N. Y. 337, 19 Am. Rep. 193; *Root v. Lowndes*, 6 Hill, 518; *Distin v. Rose*, 69 N. Y. 122; *Bodwell v. Swan*, 3 Pick. 376; *Schenck v. Schenck*, 20 N. J. Law, 208; *Watson and Wife v. Moore*, 2 Cush. 135.

From an examination of the cases just cited it will appear that the rule which permits the proof of a repetition of the same charge or of words of the same import does "not permit a distinct calumny uttered by the defendant to be given in evidence to prove his malice in speaking the words for which the action is brought." In *Distin v. Rose*, *supra*, it was said that "the repetition of the words and the publicity of the circumstance of their utterance were proper to show the motives of the defendant and extent of the injury. * * * A repetition of words imputing the same charge alleged in the complaint to have been made may be proved to have been spoken at any time before the commencement of the action, but not words imputing a different charge (citing 60 N. Y. 337, and 4 N. Y. 161)." In *Howard v. Sexton*, *supra*, the defendant had charged the plaintiff with having sworn falsely before arbitrators. The trial court permitted the plaintiff to prove that at a different time and place the defendant, in speaking of the arbitration, said, "The way they got the money was no better than highway robbery." The court received the testimony "as evidence of malice, to show with what mind the words laid in the declaration were spoken, and for no other purpose." This was held to be reversible error. The court said: "It has sometimes been argued that proof of this character shows general malice upon the part of the defendant which may properly enhance the damages against him. So would evidence that he had set fire to the house of the plaintiff or committed a battery upon his person furnish stronger proof of general malice than words, however opprobrious. * * * The modern, and I think the better, doctrine, is that the action for slander was not designed to punish the defendant for general ill will towards

his neighbors, but to afford the plaintiff redress for specific injuries. To constitute that injury, malice must be proved, not merely general ill will, but malice in the specific case set forth in the pleading, to be inferred from it and the attending circumstances. The plaintiff may show a repetition of the charge for which the action is brought, but not a different slander for any purpose." The doctrine in this case was also laid down in *Watson v. Moore*, 2 Cush. 133, and was followed and approved in *Barr v. Hack*, 46 Iowa, 308. See, also, *Scougale v. Sweet* (Mich.) 82 N. W. 1061, 1065; *Jacobs v. Cater*, 87 Minn. 448, 92 N. W. 397. Tested by this rule it is apparent, we think, that the Jones affidavit was not admissible. It was made by the defendant upon another occasion, six months before Wendall had made the affidavit which is the basis of this action and eight months before the defendant published it. It does not relate to the latter in any way or to the substance of any of the charges contained in it. The Wendall affidavit, by imputation, charges the plaintiff with a corrupt and willful refusal to perform a legal duty and with shielding criminals for a money consideration; in short with gross and willful judicial corruption and dishonesty. Exhibit E contains no such charges. It is doubtful whether it even shows the existence of general malice. Apparently it negatives it, for it expressly states that when the defendant was represented by attorneys other than McCumber, Bogart & Forbes he filed no affidavit of prejudice. But if it were conceded that an affidavit of prejudice which is made and filed for the purpose of securing another judge and under a statute authorizing that procedure, or a corroborating affidavit of like effect, is per se defamatory and prima facie indicates actual malice in its execution, a proposition we do not admit, still Exhibit E was not admissible in this case, for the charge contained in it is only prejudice (and in this case it is prejudice, not toward the defendant, but toward a third person), and is not a charge of willful corruption, such as is charged in the Wendall affidavit. If the charge of prejudice could be said to be defamatory, it was of a different nature, and under the rule above stated it was not admissible.

The second reason for its inadmissibility does not rest upon the character of its contents, but rather upon the circumstances under which it was made. It was made and filed in a judicial proceeding, and was pertinent to the issues. The occasion was privileged, and exempted the defendant from liability, even though the state-

ments contained in it were both false and malicious. It is well settled that "no action for slander will lie against a witness for what he says or writes in giving evidence in a judicial proceeding, notwithstanding it may be malicious and false. The privilege which exempts a witness from such action is absolute." *Hunckel v. Voneiff*, 69 Md. 179, 14 Atl. 500, 17 Atl. 1056, 9 Am. St. Rep. 413; *Hoar v. Wood*, 3 Metc. (Mass.) 193; *Liles v. Gaster*, 42 Ohio St. 631; *Torrey v. Field*, 10 Vt. 353, 413; *Mower v. Watson* (Vt.) 34 Am. Dec. 704; *White v. Nicholls*, 3 How. 266, 11 L. Ed. 591. Even "words spoken by a witness in a judicial proceeding concerning a stranger to the suit, which are pertinent to the issues involved and fairly responsive to the question propounded to him, are absolutely privileged, notwithstanding actual malice." *Cooley v. Galyon* (Tenn.) 70 S. W. 607, 60 L. R. A. 139, 97 Am. St. Rep. 823; *Cooper v. Phipps* (Or.) 33 Pac. 985, 22 L. R. A. 836 and note; *Blakeslee v. Carroll* (Conn.) 29 Atl. 473, 25 L. R. A. 106; *Shinglemeyer v. Wright* (Mich.) 82 N. W. 887, 50 L. R. A. 129; *Hutchinson v. Lewis*, 75 Ind. 55. But this exemption from liability does not mean that the testimony of a witness is privileged in the same sense that communications between husband and wife, attorney and client, and physician and patient are privileged, i. e., that they cannot be offered in evidence. The conditions under which the testimony of a witness may be introduced in other actions or proceedings are so well known that they need not be stated. The words of a witness are privileged in a sense that they are not actionable. For greater freedom in eliciting truth the law makes the occasion one of absolute privilege, and presumes that the statements of the witness are made in good faith and without malice. It is not because the testimony of a witness is privileged that it is not admissible to prove actual malice. The real reason, and it is a simple one, is that the statements of the witness, having been made upon a privileged occasion, are presumed to have been made in good faith and without malice. It ought to be self evident that a statement made under circumstances from which the law presumes that it was made in good faith and without malice cannot afford proof that a similar or other statements were made with malice. As one case puts it, "a malicious intent cannot be predicated upon a truthful exposition of facts." *Throckmorton v. Evening Post P. Co.*, 35 App. Div. 396, 54 N. Y. Supp. 887. The case of *Watson and Wife v. Moore*, 2 Cush. 133, is directly in point.

The plaintiff alleged in that case that the defendant had stated that he was guilty of "stealing two beds." For the purpose of showing his actual malice in making the statement, the plaintiff was permitted to introduce a sworn complaint which the defendant had filed with a magistrate, charging the plaintiff with stealing "a lot of wood and old iron," and also to introduce the testimony of the defendant given upon the trial. This was held to be error, for two reasons: (1) Because the words used in the sworn complaint did not relate to the charge which was the subject of the action, and (2) because the words were used before a magistrate having jurisdiction of the supposed offense. Upon the second ground the court said: "The complaint made by the defendant, and his testimony in support of it, on the hearing before the magistrate, are not to be regarded as slanderous words spoken by the defendant. They were proceedings in a court of justice, before a magistrate who had jurisdiction of the offense charged; and the defendant is in no way to be held answerable for them as for a slander. This has been the settled law ever since the reign of Henry VII. *Beauchampe v. Croft*, Keilw. 26, and *Dyer*, 285; *March on Slander* (Ed. 1674) 92; *Bac. Ab. 'Slander,' E*; 2 *Stark. Ev.* 874; 2 *Leigh's Nisi Prius*, 1369; *Fowler v. Homer*, 3 *Camp.* 294; *Hoar v. Wood*, 3 *Metc. (Mass.)* 197. If the charge then made by the defendant was false, and known by him to be so, he may be indicted for perjury. If the charge was malicious, and without probable cause, he is liable to the plaintiffs in an action for malicious prosecution. Even in such an action, neither malice nor want of probable cause would be presumed in the first instance, but both must be proved by legal evidence. In the present case, the proceedings before the magistrate, as given in evidence at the trial, do not warrant the inference that the defendant was actuated by malice. The legal presumption is that he acted bona fide, and the contrary cannot be shown on the trial of the issues joined in this case. If it is not shown, and cannot be shown, that the defendant was then actuated by malice, those proceedings furnish no evidence that the charge for which this action is brought was maliciously made by him. * * * In the present case, the defendant made a complaint to the magistrate, on oath, and testified, on oath, at the hearing. For this reason, as before stated, he must now be presumed to have acted with good faith."

McDavitt v. Boyer (Ill.) 48 N. E. 317, is to the same effect. The court said: "It is true, as a general rule of law, that, if words are in themselves actionable, malicious intent in publishing them is an inference of law, and therefore needs no proof. * * * Generally speaking, every defamation is presumed by law to be malicious. * * * But this general rule is subject to the important qualification that, where the injurious utterance is privileged, the law does not presume malice, and express malice must be proved by the plaintiff. Privileged communications constitute an exception to the general rule that the utterance of actionable words implies malice. Such privileged communications are presumed not to be malicious; in other words, the law does not imply malice when the injurious communication is privileged. In such case the occasion on which the utterance was made prevents the ordinary inference of malice. * * * The question then arises, what are privileged communications, within the signification of the term as applicable to cases like the present? In other words, when are injurious utterances privileged, so as to prevent the inference of malice? In the first place, such privilege belongs to a witness testifying upon the stand in a court of justice. No action for slander will lie against a witness for what he says or writes in giving evidence in a judicial proceeding, notwithstanding it may be malicious or false. The privilege that exempts a witness from such action is absolute. An action for slander will not lie for testimony given in a case if such testimony is pertinent and material to the subject of inquiry. No witness should be compelled to take the stand with the fear hanging over him that an action of slander may at some time be brought against him for what he says as a witness. Public policy and the interests of public justice require that statements made by witnesses when testifying in courts of justice should be privileged, and that witnesses should not be liable in civil actions for reflections thrown out in delivering their testimony. * * * Cooley, in his work on Constitutional Limitations (6th Ed. 542), says: 'Among the cases which are absolutely privileged on reasons of public policy, that no inquiry into motives is permitted in an action for slander or libel, is that of a witness giving evidence in the course of a judicial proceeding. It is familiar law that no action will lie against him at the suit of a party aggrieved by his false testimony, even though malice be charged.' * * * Whatever is said or written in a legal pro-

ceeding, pertinent and material to the matter in controversy, is privileged; and no action can be maintained upon it. *Spaids v. Barrett*, 57 Ill. 289, 11 Am. Rep. 10; *Strauss v. Meyer*, 48 Ill. 385. Malice cannot be predicated of what is said or written in a proceeding in a court of justice. Words spoken to a magistrate in the course of a judicial proceeding, though they may be slanderous and malicious, are not actionable. * * * Mere proof of what he uttered under these circumstances is not prima facie proof of malice. The utterances thus made do not of themselves imply malice." The following cases directly sustain our conclusion that a statement made upon a privileged occasion is no evidence that the same or other statements were made with actual malice: *Fahr v. Hayes* (N. J.) 13 Atl. 261; *Evening Journal Association v. McDermott*, 44 N. J. Law, 430, 43 Am. Rep. 392; *Shinglemeyer v. Wright* (Mich.) 82 N. W. 887, 50 L. R. A. 129. The contrary view, expressed in *Davis v. Starrett*, 97 Me. 568, 55 Atl. 516, and relied upon by plaintiff's counsel, is based upon reasons which wholly ignore the presumption of good faith with which the law clothes all statements made upon privileged occasions. For the reasons already stated it is patent that the admission of Exhibit E was error, and it is equally clear, we think, that it was highly prejudicial. It was introduced solely to show the defendant's malice in publishing the Wendall affidavit, and was submitted to the jury for that purpose and no other. In it the defendant testified to facts bearing upon an alleged personal and political enmity existing between the plaintiff and P. J. McCumber, adversely to the plaintiff, and that as a consequence the plaintiff was prejudiced in all cases in which said McCumber was interested. The trial court submitted this to the jury as competent evidence of malice, and upon it the jury were authorized to sustain the plaintiff's action and to measure the damages to be awarded. To what extent the erroneous admission of this affidavit, and its emphatic statements in reference to a bitter controversy wholly foreign to this case, contributed to sustain the plaintiff's cause of action, or how much it added to the award of punitive damages, cannot, of course, be known; but that it was highly damaging is certain. Whether, as counsel for plaintiff contend, the affidavit was competent for impeaching the testimony of Jones, which was, in effect, that he was and had been personally friendly to the plaintiff, and had always said that he was an upright judge and an upright man, we need not determine. It is sufficient

to say that it was not offered in evidence or given to the jury for that purpose. It is true, evidence which is competent for one purpose cannot be excluded because it is incompetent for another purpose. It may be admitted and restricted to the proper purpose. As to such evidence this court had said that: "Where evidence is properly admitted in the case for one purpose, it will not be presumed, in the absence of a showing, that it was considered for a purpose for which it was not proper; particularly when the court, in its charge, directs the jury to consider it only for its proper purpose." *State v. Kent*, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518; *Letton v. Young*, 2 Metc. (Ky.) 558. Had the affidavit in fact been offered for impeachment, the above rule would have been applicable; but it was not offered for that, but for an improper purpose solely, and the injury resulting is not diminished by the fact that it might have been offered and restricted in its use for another and proper use.

One further question remains. It is urged on behalf of the defendant that the rule followed in the original opinion, i. e., that the truth of the alleged libelous charge cannot be proved under a general denial and in the absence of a plea of justification, does not apply when the charge is privileged. There is authority for this view. In *Edwards v. Chandler*, 14 Mich. 474, 90 Am. Dec. 249, this language was used: "Where a communication is privileged, the plaintiff cannot recover without proving affirmatively, not only the falsehood of its contents, but also that it was published with express malice. Unless he can prove both of these grounds, he must fail. The falsehood being a necessary part of the case to be made out by the plaintiff, the truth is but a contradiction of that case, and may be made out under the general issue, therefore without resort to a special plea or notice." The rule laid down in this case and others tending to sustain it is unsound in principle and opposed to the great weight of authority. It is not a part of the plaintiff's case to prove the falsity of the words. "The falsity of the words is indeed always presumed in the plaintiff's favor." *Newell on Slander and Libel* 771; *Palmer v. Mahin*, 120 Fed. 737, 57 C. C. A. 41; *Mallory v. Bennett* (C. C.) 15 Fed. 371. And this is true when they are used on a privileged occasion. "A libelous statement made on a privileged occasion is presumed to be untrue, and the burden of proving its truth is on defendants, though the nature of the occasion saves them, in the first instance,

from the imputation of malice." *Cranfill v. Hayden* (Tex. Civ. App.) 75 S. W. 573. In *Atwater v. Morning News Co.* (Conn.) 34 Atl. 865, the contention was advanced that as to a statement made upon a privileged occasion the plaintiff has the burden of proving its falsity. This the court denied, and said: "The opinion of the court in *Edwards v. Chandler*, 14 Mich. 475, 90 Am. Dec. 249 (and one or two other cases cited by the defendant), seems to afford excuse for this claim, but we hardly think that such was the real intention of the learned judges who gave the opinion in those cases." The only exception that occurs to us, and it is more apparent than real, is when a plaintiff, to prove actual malice, attempts to show that the defendant published the statement, knowing it to be false, a method of proving malice which is always available, and which, if successful, affords conclusive evidence of malice. The plaintiff must, in that event, show (1) that the statements are false in fact, and (2) that defendant knew them to be false when he published them. In such cases the defendant may meet the plaintiff's evidence with evidence that the statements were true. This is meeting the issue as to the truth of the charge, which the plaintiff has voluntarily tendered. When it is not thus tendered, the defendant cannot offer evidence of the truth of the charge unless he pleads it.

For the error above pointed out, the order denying a new trial must be reversed, and it is so ordered. All concur.

(101 N. W. 907.)

HANNAH PULS V. THE GRAND LODGE OF THE ANCIENT ORDER OF
UNITED WORKMEN OF NORTH DAKOTA.

Opinion filed December 10, 1904.

Life Insurance — False Representations in Application.

1. In an application for insurance, the insured stated that he was not addicted to the habit of drinking intoxicating liquor, and had never drank immoderately. There was evidence that he sometimes drank intoxicating liquor, and on a few occasions appeared to be intoxicated. *Held*, that the evidence was not sufficient to sustain the allegation that the representations in the application were false, so as to require the submission of that question to the jury, in an action on the policy.

Proofs of Death and Verdict of Coroner's Jury Have no Probative Force.

2. Proofs of death and the verdict of the coroner's jury stated that the insured died from alcoholic poisoning, and were admitted in evidence without objection. *Held*, that they had no probative force, because they expressed a mere opinion, based on the same evidentiary facts as were before the trial jury, and the report of death was not prepared by or in behalf of the beneficiary, and hence was not in the nature of an admission by her.

Payment of Dues by Financier of Local Lodge Upon Arrangement With Third Party Prevents Forfeiture of Policy.

3. The insured was a member of a benevolent and fraternal insurance association, and, under the terms of the contract of insurance, he would forfeit his membership and insurance by failure to pay assessments and dues within the time fixed by the by-laws. The dues and assessments were regularly paid for him to the lodge by the financier of the local lodge, pursuant to an arrangement between the financier and a third person, who agreed to reimburse the financier for such payments. *Held*, that the insured had not forfeited his insurance, although the third person did not in fact reimburse the financier for such payments until after the death of the insured.

Evidence as to Habits of Deceased.

4. Testimony of person who, by their association with the insured, had an opportunity to observe his habits, that they had seldom or never seen him drink or appear to be under the influence of liquor, was competent to show that he was not an habitual or immoderate drinker.

Declaration of Deceased as to His Malady — Res Gestae.

5. Declarations of a sick or injured person as to the nature, symptoms and effects of the disease or injury under which he is suffering at the time are competent evidence in an action wherein the nature and cause of the malady are in question.

Same.

6. Voluntary and spontaneous declarations of the deceased to those in attendance upon him as to the cause of his illness, due to poison, from which he was then suffering, and soon died, are admissible in evidence as part of the *res gestae*, where the circumstances are such as to preclude the idea of premeditation or any motive for falsifying.

Verdict Sustained.

7. Evidence examined, and *held* to sustain the finding of the jury that the death of the insured was not caused by indulgence in intoxicating liquor.

John Carmody, G. A. Bangs and Fred A. Kelley, for appellant.

The officers of the subordinate lodges are the agents of the members thereof in the transaction of all official business required of them by the beneficiary rules, and are not the agents of the grand lodge. *Graves v. M. W. A.*, 89 N. W. 6; *Elder v. Grand Lodge A. O. U. W.*, 82 N. W. 987; *Grand Lodge A. O. U. W. v. King*, 38 N. E. 352.

The testimony of the witness Smith, that the deceased when sick said he had taken horse medicine, was incompetent and hearsay, made out of the hearing of the defendant, and no part of the *res gestae*, and intended to help plaintiff's case. *Riley v. Riley*, 9 N. D. 580, 84 N. W. 347; *Scribner v. Adams*, 73 Me. 541; *Perry v. Roberts*, 17 Mo. 36.

The fact that the collecting officer received assessments after they were due was not binding on defendant, he being the agent of the members of the subordinate lodge, and not of defendant. *Graves v. M. W. A.*, 89 N. W. 6; *Grand Lodge A. O. U. W. v. King*, 38 N. E. 352; *Elder v. Grand Lodge A. O. U. W.*, 82 N. W. 987.

An applicant for life insurance is bound by his representations in the application for a policy. *Knudson v. Grand Council of N. W. Legion of Honor*, 63 N. W. 911; *Schmitt v. Supreme Tent of Maccabees*, 73 N. W. 22; *Hogness v. Supreme Council of Champions of Red Cross*, 18 Pac. 125; *Perine v. Grand Lodge A. O. U. W.*, 53 N. W. 367; *Cobbs v. Covenant Mutual Ben. Ass'n*, 10 L. R. A. 666.

The verdict of the coroner's jury that deceased came to his death by the continued use of alcoholic spirits as a beverage, the same being admitted without objection, is *prima facie* proof of the cause of his death. 1 *Greenleaf*, section 556; 1 *Starkie*, section 1009; *Grand Lodge of Ill. v. Wieting*, 48 N. W. 48; *U. S. Life Ins. Co. v. Kielgast*, 6 L. R. A. 65; *Walther v. Mutual Ins. Co.*, 4 Pac. 413; *Pyle v. Pyle*, 41 N. E. 999.

The proofs of death were admitted in evidence without objection, and show that the decedent's death was caused by alcoholic poisoning and are *prima facie* evidence of the facts therein stated. *Walther v. Mutual Life Ins. Co.*, 4 Pac. 413; *Mut. Ben. Ins. Co. v. Newton*, 22 Wall. 32, 22 L. Ed. 793; *Modern Woodmen of Amer. v. Von Wold*, 6 Kan. App. 231.

When a beneficiary certificate was issued, upon representations that the deceased was not addicted to the use of intoxicating

liquors, if he was, then plaintiff cannot recover. *McVey v. A. O. U. W.*, 20 Atl. 873; *Meacham v. N. Y. State Mut. Ben. Ass'n*, 24 N. E. 283; *Van Valkenburg v. Ins. Co.*, 70 N. Y. 605; *Grand Lodge A. O. U. W. v. Belcham*, 33 N. E. 886; *Knickerbocker Life Ins. Co. v. Foley*, 105 U. S. 350, 26 L. Ed. 1055.

It was for the jury, not the court, to say whether deceased obtained the beneficiary certificate by false representations as to his habits of drinking intoxicating liquors. A question should never be taken from the jury where there is evidence to sustain it. *Vickery v. Burton*, 6 N. D. 245, 69 N. W. 193; *McRae v. Hillsboro Nat'l Bank*, 6 N. D. 353, 70 N. W. 813; *Pirie v. Gillitt*, 2 N. D. 255, 50 N. W. 710; *Slattery v. Donnelly*, 1 N. D. 264, 47 N. W. 375; *Cameron v. G. N. Ry. Co.*, 8 N. D. 124, 77 N. W. 1016.

The issue as to whether deceased obtained the beneficiary certificate sued on by false representations as to his being addicted to the use of intoxicating liquors, should have been submitted to the jury under proper instructions. *McVey v. A. O. U. W.*, 20 Atl. 873; *Meacham v. N. Y. State Mut. Ben. Ass'n*, 24 N. E. 283; *Van Valkenburg v. Ins. Co.*, 70 N. Y. 605; *Belcham v. Grand Lodge A. O. U. W.*, 33 N. E. 886; *Knickerbocker Life Ins. Co. v. Foley*, *supra.*

Frick & Kelly, for respondent.

A beneficial society that knowingly permits a dissolute or drunken member to retain his membership during his lifetime will be estopped to cancel his insurance upon that ground after death. *Grand Lodge A. O. U. W. v. Brand*, 46 N. W. 95; *High Court of Forresters v. Schweitzer*, 49 N. E. 506; *Coverdale v. Royal Arcanum*, 61 N. E. 915; *Supreme Tent, etc., v. Volkert*, 57 N. E. 203; *N. W. Mut. Life Ins. Co. v. Hazelett*, 4 N. E. 582; *McGurk v. Insurance Co.*, 16 Atl. 263; *Newman v. Covenant Mut. Ben. Ass'n*, 40 N. W. 87; *Insurance Co. v. Hanna*, 81 Tex. 487; *Supreme Lodge v. Davis*, 58 Pac. 595; *Pomeroy v. Insurance Inst.*, 59 Am. Rep. 144.

The acceptance and retention of dues and assessments and the acceptance thereof, after death, and the failure of the defendant to declare the policy forfeited, taken singly or together, are sufficient to estop the defendant from asserting the defense set up in its answer. *M. W. A. v. Lane*, 86 N. W. 943; *M. W. A. v. Coleman*, 89 N. W. 641; *Phoenix Life Ins. Co. v. Raddin*, 120 U. S. 183, 30 L. Ed. 644; *Erdman v. The Mut. Ins. Co. of the Order of*

Herman's Sons, 44 Wis. 376; Supreme Lodge v. Wollenvos, 119 Fed. 671; McCormick v. Association, 56 N. Y. Supp. 905; Supreme Lodge v. Turner, 47 S. W. 44; Supreme Court of Honor v. Sullivan, 59 N. E. 37; Home Fire Ins. Co. v. Phelps, 71 N. W. 303.

The view is very generally sustained that officers of local lodges are agents of the responsible body and that the supreme lodge is bound by their acts. Grand Lodge A. O. U. W. v. Lachmann, 64 N. E. 1022; M. W. A. v. Tevis, 117 Fed. 369; Woodmen v. Lane, *supra*; Order of Forresters v. Schweitzer, *supra*; Mee v. Banker's Life Ass'n of Minn. 72 N. W. 74.

Beneficiary certificates are *prima facie* proof of good standing, and when in evidence, have the further effect of casting the burden of proof upon the defendant of showing that such good standing no longer continues. Kumle v. Grand Lodge A. O. U. W., 42 Pac. 634; Elmer v. Mut. Ben. Ass'n, 64 Hun, 639, 138 N. Y. 642, 34 N. E. 512; Chadwick v. Triple Alliance, 56 Mo. App. 463; Scheuffler v. Grand Lodge A. O. U. W., 47 N. W. 799; Lazinsky v. Supreme Lodge, 31 Fed. 592; Agnew v. Grand Lodge A. O. U. W., 17 Mo. App. 254.

A witness testified that during eleven years he had known deceased to drink twice; another pronounced the departed brother a "very moderate drinker;" another saw deceased drink from a bottle, and another in 1895 saw him "very slightly, if any, under the influence of liquor." Such testimony is wholly inadequate to establish the existence of a habit of drinking in deceased. Knickerbocker Life Ins. Co. v. Foley, 105 U. S. 350; 26 L. Ed. 1055; N. W. Life Ins. Co. v. Muskegon Bank, 122 U. S. 501, 30 L. Ed. 1100; Aetna Life Ins. Co. v. Davey, 123 U. S. 739, 31 L. Ed. 315; Wolf v. Insurance Co., 9 Fed. 249; Chambers v. N. W. Mut. Life Ins. Co., 67 N. W. 367; Van Valkenburg v. Insurance Co., 70 N. Y. 605; Insurance Co. v. Simpson, 28 S. W. 837; Grand Lodge A. O. U. W. v. Belcham, 33 N. E. 886.

Courts do not presume fraud; defendant must show the facts by proof that would be clear, satisfactory and convincing, so as to exclude every other reasonable hypothesis. Ley v. Metropolitan Life Ins. Co., 94 N. W. 568; Leman v. Manhattan Life Ins. Co., 24 L. R. A. 589.

The burden of proof was on the defendant to establish its contention as to alleged false answers as to alleged cause of decedent's

death. *Insurance Co. v. Bank*, 72 Fed. 413; *Insurance Co. v. Wood*, 73 Fed. 81; *Mer. Mut. Ins. Co. v. Folsom*, 85 U. S. 237; 21 L. Ed. 827; *Fiske v. Ins. Co.*, 32 Mass. 310; *Daniels v. Insurance Co.*, 66 Mass. 416; *Supreme Lodge v. Wollschlager*, 44 Pac. 598; *Modern Woodmen v. Sutton*, 38 Ill. App. 327; *Nat'l Ben. Ass'n v. Grauman*, 7 N. E. 233; *Perine v. Grand Lodge A. O. U. W.*, 53 N. W. 367.

If the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury. *Avery v. Bowdon*, 6 El. & Bl. 953, 88 E. C. L. 953; *McMahon v. Leonard*, 6 H. of L. Cas. 992; *Witkowsky v. Wasson*, 71 N. C. 451; *Peet v. Dakota F. & M. Ins. Co.*, 1 S. D. 462, 47 N. W. 532; *Levitzky v. Canning*, 33 Cal. 299; *Dodge v. Gaylord*, 53 Ind. 365; *Holland v. Kindregan*, 155 Pa. St. 156, 25 Atl. 1077; *Cole v. Hebb*, 7 Gill & J. 41.

Fraternal insurance contracts should be liberally construed to effect the benevolent objects of the different bodies. *Supreme Lodge K. P. v. Schmidt*, 98 Ind. 374; *Ballou v. Gile*, 7 N. W. 561; *Payne v. Mut. Rel. Soc.* 2 How. Pr. 228; *Mass. Ben. Life Ass'n v. Robinson*, 42 L. R. A. 261; *Goodwin v. Provident Savings Ass'n*, 32 L. R. A. 473; *Burkheiser v. Nat. Acc. Ass'n*, 26 L. R. A. 112; *Kratzenstein v. Western Ass'n Co.*, 5 L. R. A. 799; *Pettit v. State Ins. Co.*, 43 N. W. 378; *Olson v. Ins. Co.*, 35 Minn. 432; *Price v. Ins. Co.*, 17 Minn. 497.

The proof of death has no probative force whatever to sustain any issue looking to the forfeiture of the beneficiary's right to the insurance. *Cox v. Royal Tribe of Joseph*, 60 L. R. A. 630; *Bentz v. N. W. Aid Ass'n*, 41 N. W. 1037; *Goldschmidt v. Mut. Life Ins. Co.*, 7 N. E. 408; *Anderson v. Supreme Council*, 31 N. E. 1092; *McMaster v. Ins. Co.*, 55 N. Y. 222.

It was within the discretion of the trial court to permit plaintiff to show in rebuttal that deceased's habits as to the use of intoxicants, were otherwise than claimed by defendant. *Maier v. Mass. Ben. Ass'n*, 65 N. W. 552.

The representations by a sick person of the nature, symptoms and effects of the malady, under which he is laboring at the time, are received as original evidence. 1 *Greenleaf on Ev.*, section 102; *Sanders v. Reister*, 46 N. W. 680; *Travelers Ins. Co. v. Mosley*, 8 Wall. 397, 19 L. Ed. 437; *Bennett v. N. P. Ry. Co.*,

2 N. D. 112, 49 N. W. 408; *Atkinson, T. & S. F. R. Co. v. Johns*, 14 Pac. 237; *Hagenlocker v. Railway Co.*, 99 N. Y. 137; *Hathaway v. Ins. Co.*, 48 Vt. 335; *Depew v. Robinson*, 95 Ind. 109; *Bacon v. Charlton*, 7 Cush. 581; *Hatch v. Fuller*, 131 Mass. 574; *State v. Howard*, 32 Vt. 380; *Elliott v. Van Buren*, 33 Mich. 49; *Howe v. Plainfield*, 41 N. H. 135; *Towle v. Blake*, 43 N. H. 92; *Taylor v. Railway Co.*, 43 N. H. 304; *Rogers v. Crane*, 30 Texas, 284; *Insurance Co. v. Newton*, *supra*; *Ins. Co. v. Gerrish*, 61 Ill. App. 140; *Insurance v. Warren*, 22 Am. Rep. 590; *Phillips v. Kelly*, 29 Ala. 628.

The declarations of a party to the suit explanatory of his physical condition at the time the declarations were made, are admissible where the circumstances warrant the inference that they were made spontaneously and not with a view to their effect upon the controversy. Whether or not they fall within this rule must be left largely to the discretion of the trial court. *Hewett v. Eisengart*, 55 N. W. 252; *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138, 1 N. E. 364, 52 Am. Rep. 653; *Cleveland C. C. & I. R. Co. v. Newell*, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312; *Blair v. Madison County*, 46 N. W. 1093; *Eckels v. Bates*, 26 Ala. 655; *Towle v. Blake*, *supra*; *Kennard v. Burton*, 25 Me. 29, 43 Am. Dec. 249; *Elliott v. Van Buren*, *supra*.

INGERUD, J. This is an action to recover upon a beneficiary certificate or policy of insurance issued by defendant to plaintiff's husband, Barney Puls, and payable to plaintiff upon the death of her husband. The trial resulted in a verdict for plaintiff. Defendant has appealed from the judgment entered on the verdict.

Appellant is a benevolent and fraternal insurance association, made up of three interdependant organizations—a supreme lodge; a state grand lodge, having authority from the higher order; and subordinate lodges throughout the state, chartered by the grand lodge. The grand lodge (appellant in this action) is the contracting and responsible body of the order. Contracts of insurance are issued and approved by its officers, and it is held responsible for the payment of all death losses. The subordinate lodges have primary authority to admit applicants to membership, subject to regulations imposed by the grand lodge, and are also charged with the duty of collecting assessments levied upon its members, and making report and remittance thereof to the grand lodge. They also have authority, under certain restrictions, to reinstate

suspended members. The beneficiary fund, out of which insurance is paid by the grand lodge, is obtained by assessments of \$1 upon each certificate holder for every death. Such assessments are made by the grand lodge on the 1st day of the month, and are payable on the 28th day of the month when made. In addition to these assessments by the grand lodge, the members are also required to pay quarterly dues to the local lodge to which they belong. Barney Puls became a member of Lakota Lodge, No. 117, on the 2d day of May, 1898. At the same time he received from appellant the beneficiary certificate in question, by which appellant bound itself to pay to the beneficiary designated therein the sum of \$2,000 upon the death of the said Barney Puls, subject to the conditions fixed by the constitution and by-laws of the order and the application for membership, all of which, by the terms of the certificate, were made part of the contract of insurance. Originally the certificate was made payable to one Anton Puls, but on May 2, 1901, in accordance with the rules of the order, the present plaintiff was substituted as beneficiary. On September 11, 1901, Barney Puls died. Proofs of death were duly made by the officers of the local lodge in accordance with the rules of the order and transmitted to the grand lodge. The latter body refused to pay the loss, and thereupon this action was brought.

The answer set up two defenses: First, that the insured obtained his certificate by false and fraudulent representations as to his habits with respect to the use of intoxicating liquors; second, that his death was caused directly by the use of intoxicating liquors. Either of these facts, if established, would, under the terms of the contract of insurance, relieve the defendant from liability. Defendant contends that both of these defenses were conclusively established by the evidence, and that its motion for a directed verdict should have been granted.

The trial court held that the evidence was insufficient to sustain the allegation of false representations, and instructed the jury not to consider that defense. The representations which appellant alleges were false are contained in the answers made by the insured to the following questions found in the application for membership: "Do you drink spirituous liquors? A. No habit." "Do you drink malt liquors? A. No." "Did you ever drink immoderately? A. No." The application was made in May, 1898. There is no evidence in the record that Puls drank malt liquors or that he drank

immoderately before taking the insurance. The answer, "No habit," was an affirmation that he was not an habitual user of spirituous liquor, but it was also an admission that he was not a total abstainer. The most that can be said of the evidence on this question is that it shows that the insured sometimes drank liquor, and on a very few occasions appeared to have become intoxicated. This falls far short of showing him to be an immoderate or habitual drinker. "An occasional excess in the use of intoxicating liquor does not constitute a habit, or make a man intemperate, within the meaning of the policy. * * * The habit of using intoxicating liquor to excess is the result of indulging a natural or acquired appetite by continual use until it becomes a customary practice. This habit may manifest itself by delayed or periodical intoxication or drunkenness. When the general habits of a man are either abstemious or temperate, an occasional indulgence to excess does not make him a man of intemperate habits." Bacon on Benevolent Societies, section 231. See, also, *Insurance Co., v. Foley*, 105 U. S. 350, 26 L. Ed. 1055; *Insurance Co. v. Bank*, 122 U. S. 501, 7 Sup. Ct. 1221, 30 L. Ed. 1100; *Insurance Co. v. Reif*, 36 Ohio St. 599; 38 Am. Rep. 613; *Grand Lodge v. Belcham (Ill.)* 33 N. E. 886. The question. "Did you ever drink immoderately?" referred to the applicant's previous habits, and not to exceptional and occasional acts. *Chambers v. Insurance Co.*, 64 Minn. 495, 67 N. W. 367; 58 Am. St. Rep. 549; *Van Valkenburgh v. Insurance Co.*, 70 N. Y. 605; *Grand Lodge v. Belcham*, supra. We think, therefore, the trial court was right in holding that the defense of false representation was not sustained by the evidence, and in so instructing the jury.

As to the defense that the deceased came to his death as the direct result of intoxication, the evidence was conflicting, and the trial court therefore properly denied defendant's motion for a directed verdict, and submitted the question to the jury.

The evidence chiefly relied upon by defendant to sustain its averment that Puls' death was caused by the use of intoxicating liquor was the report of death, the verdict of the coroner's jury, and the testimony of Dr. Beek. The report of death and the verdict of the coroner's jury stated that the cause of death was alcoholic poisoning. The statement in the report as to the cause of death was based upon the opinion of Dr. Beek and upon the finding of the coroner's jury. The finding of the coroner's jury as

to the cause of death was, in turn, predicated upon the opinion of Dr. Beek, who made the post mortem examination, and upon certain circumstances fully disclosed at the trial. Neither of these documents added anything to the weight of the testimony given by the doctor and other witnesses at the trial, because both documents merely set forth an opinion based on the same evidentiary facts which were before the trial jury. The respondent had nothing to do with the making of the report of death. That report was made by the officers of the local lodge pursuant to the rules of the order, and the intent and purpose of such rules were to prevent the beneficiary from having anything to do with the report. The respondent was not present and had nothing to do with the post mortem examination or the coroner's inquest. Consequently neither the report of death nor the verdict of the coroner's jury were in the nature of admissions by the beneficiary. As neither of the documents was objected to, we express no opinion as to their admissibility. It is clear that neither of the documents was conclusive evidence against the plaintiff, but had only such evidentiary weight as the circumstances attending the making of them entitled them to. *Cox v. Royal Tribe (Or.)* 71 Pac. 73, 60 L. R. A. 622, 95 Am. St. Rep. 752, and cases therein cited; *Stevens v. Casualty Co.*, 12 N. D. 463, 97 N. W. 862. Under the circumstances of this case, as we have seen, they could add nothing to the weight of the testimony of defendant's witnesses.

It is unnecessary to state the testimony in detail. The evidence in behalf of defendant tended to show that the deceased appeared to be under the influence of liquor a day or two before he died; that the conditions disclosed by the post mortem examination of the body were such as would be produced by alcoholic poisoning, and that the odor of alcohol was detected when the abdominal cavity was opened. It was admitted that any of the numerous alkaloid poisons would produce the same conditions as were disclosed by the post mortem examination. The defendant's assertion that alcohol produced death, therefore, rests chiefly upon the alleged fact that the deceased had been drinking to excess, the odor of alcohol, and conditions consistent with alcoholic poisoning, but not inconsistent therewith. The evidence in behalf of plaintiff tended to show that the deceased had not been drinking and was not intoxicated during the two or three days before his death, but, on the contrary, appeared to be sober and in his usual health; that there

was no liquor in his house, and he did not drink any while sick; that the night or day before he died he became violently ill, and complained of acute pains in the region of the stomach, and said that he had drank from a bottle of horse medicine in the house. Whether he took the horse medicine by accident or design, does not appear. One of the physicians, who was a witness for defendant, testified that alcoholic poisoning does not ordinarily cause acute pain; and the doctor who testified for plaintiff testified that the odor of alcohol could not be detected unless the deceased had drank the liquor less than twelve hours before death. Upon this evidence, the case was properly one for the jury, and the verdict should not be disturbed.

The appellant further contends that the evidence shows that the deceased was not a member in good standing of the defendant order at the time of his death, because he had failed to pay his dues and assessments to the local lodge for several months. The trial court denied defendant's application, made during the trial, for leave to amend its answer to correspond with the proof, so as to allege, as a further defense, the nonpayment of dues and assessments. One of the by-laws of the defendant provides: "Any member failing or neglecting to pay all assessments made upon him for the beneficiary or guaranty funds to the financier of the lodge of which he is a member, on or before the twenty-eighth day of the month in which said assessments are made, shall forfeit all his rights as such member; shall stand suspended from all the rights, benefits and privileges of the order from and after that date, and shall not be reinstated except as hereinafter provided." It appeared from the evidence, most of which was introduced by the defendant, that one Metcalf, who had been an employer of and friend of the deceased, had, long before the death of Puls, guaranteed the payment to the financier of Puls' dues and assessments as they came due. The arrangement was that the financier of the lodge should regularly record as paid all dues and assessments against Puls, and Metcalf was to make the amounts good to the financier. It does not appear what the arrangement was between Puls and Metcalf which led to the agreement of the latter to pay these dues and assessments. Pursuant to the arrangement mentioned, the financier regularly credited Puls on the lodge records for the dues and assessments, and remitted the latter to the grand lodge as called for. After the death of Puls, Mr. Metcalf, in accordance with his agreement, paid to the financier the amounts

which the latter had advanced on Puls' account. A receipt was given therefor, dated October 15, 1901, reciting the payment by Metcalf, for Puls, of the assessments and dues. The money mentioned in the receipt, which was known as "Exhibit 2," was to reimburse the financier for money advanced by him on Puls' account under the arrangement mentioned. No provision of the constitution or by-laws is pointed out which would prevent the financier from advancing the amount of the assessment for a member, or prevent a member from borrowing from the financier for that purpose. In the absence of any such provision, a member can borrow money to pay assessments, and can constitute the lender his agent to pay the borrowed money for him, in his name, to the lodge. No advantage could be taken of the fact that the member did not take physical possession of the money, and personally pay it in. We see no reason why a member cannot accomplish the same thing by having a third person make a similar arrangement for him, and agree to reimburse the financier for the moneys so temporarily advanced. The object in fixing a day beyond which members may not permit assessments to remain unpaid is to insure the replenishment of the beneficiary and relief fund so as to permit the grand lodge to promptly fulfill its contract obligations. Where, therefore, the responsible organization has received the money assessed against a member in time, it has suffered no injury, and should not be permitted, in equity and good conscience, either before or after the death of a member, to say that a forfeiture had occurred because a member had borrowed money to pay his assessment. The evidence with relation to the transaction in question shows a loan transaction. The money was advanced with which to pay Puls' assessments from time to time as the result of an agreement between Metcalf, on behalf of Puls, and the financier of the lodge. The payment by Metcalf to the financier of the moneys the latter had advanced for Puls in his lifetime was in fulfillment of Metcalf's guaranty, and was not a payment of Puls' assessments after the time fixed in the by-laws or after death. The payments of Puls' assessments to the grand lodge were in time, and no forfeiture or suspension under the rules could result. *United Commercial Travelers v. McAdam*, 125 Fed. 358, 61 C. C. A. 22. There being no conflict in the evidence as to the payment of dues and assessments by or on behalf of Puls, the court rightly decided, as a matter of law, that Puls was in good standing at the time

of his death, and for the same reason properly denied defendant's motion for leave to amend.

Appellant assigns error on the admission of Exhibit 2—the receipt mentioned above. The receipt was doubtless immaterial, but, under the circumstances above stated, we do not think it was prejudicial.

Several witnesses were permitted to testify that they had not seen Barney Puls under the influence of liquor, or that they had not seen him intoxicated, on more than a few occasions. This line of testimony was objected to by defendant on the ground that it was incompetent. We think it was admissible. Defendant was endeavoring to show that the deceased was an habitual and immoderate drinker, for the purpose of establishing the alleged falsity of the application, and also to support the allegation that his death was due to excessive use of intoxicants. It was clearly competent, therefore, for the plaintiff to overcome this alleged evidence of habit by showing that persons who were well acquainted with the deceased in his lifetime, and had opportunity to observe his habits, had not seen him drink, except on infrequent occasions. If the deceased was in the habit of drinking to excess, it could hardly fail to be observed by his neighbors and associates. The fact that they seldom saw him drink or become intoxicated is certainly strong evidence that he did not have the drink habit. The witnesses who testified on this subject were such as had opportunity to observe his habits. The testimony was competent.

Appellant assigns error on the admission of the testimony of two witnesses who were in attendance upon deceased part of the time during the last twenty-four hours of his life, to the effect that he seemed to be suffering intensely, and complained frequently of acute pains in the stomach. Each of the witnesses was also permitted, over objection, to testify that the deceased, while suffering from these pains, said that he had taken some horse medicine, and indicated to one of the witnesses the bottle from which he had taken it. The witness did not know what the nature of the medicine was. This testimony, so far as it related to the apparent suffering of the deceased, and to his acts and complaints, expressing the nature and degree of pain he was at the time undergoing, was clearly admissible, on familiar principles. *Bennett v. Ry. Co.*, 2 N. D. 112, 49 N. W. 408, 13 L. R. A. 465. The testimony as to what the deceased said as to the supposed cause of his

suffering presents a question of more difficulty. The evidence showed that the deceased, while alone in his house, was suddenly taken violently ill, and died within less than twenty-four hours. It is undisputed that his death was due to poison. It was defendant's theory that the poison was alcohol, which the deceased had voluntarily imbibed to produce intoxication; and it relied upon evidence which it claimed excluded the probability of any other cause of death than alcoholic poisoning, resulting from the excessive use of intoxicating liquor. The statements in question were made by the deceased, while in the midst of intense suffering, to those who were trying to find means to give him relief. If the horse medicine had caused the trouble, it was most natural for the sufferer to say so to his nurses, in explanation of his condition. The circumstances under which the statement was made absolutely preclude the idea that the statement was untrue or premeditated, or was prompted by other motives than a hope for immediate relief. It was called forth and was immediately connected with the action of the poison within him. We think the statement was part of the *res gestae*. The fact that the fatal drink may have been taken some hours before is not controlling. The nature and strength of the connection between the act and the declaration must be looked to, as well as the connection in point of time and place. Closeness in point of time and place to the act is immaterial, but not the only test to be applied in determining whether a declaration is part of the *res gestae*. It is obvious that the competency of the evidence cannot be tested by a clock or a foot rule. The case of *Insurance Co. v. Mosley*, 75 U. S. 397, 19 L. Ed. 437, is directly in point. In that case, as in this, the cause of the death of the insured was the crucial question. Declarations of the deceased as to the cause of the injury, made to one who found him in pain soon after the accident, were admitted in evidence. After an exhaustive review of the authorities, Mr. Justice Swaine, speaking for the majority of the court, said: "In the complexity of human affairs, what is done and what is said are often so related that neither can be detached without leaving the residue fragmentary and distorted. There may be fraud and falsehood as to both, but there is no objection to one that does not exist equally as to the other. To reject the verbal fact would not infrequently have the same effect as to strike out the controlling member from a sentence, or the controlling sentence from its context. * * *

Here the principal fact is the bodily injury. The *res gestae* are the statements of the cause made by the assured almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress. Where sickness * * * is the subject of inquiry, the sickness * * * is the principal fact. The *res gestae* are the declarations tending to show the reality of its existence, and its extent and character. The tendency of recent adjudication is to extend, rather than to narrow, the scope of the doctrine. Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results. There is none which rests on a more solid basis of reason and authority. * * * In the ordinary concerns of life, no one would doubt the truth of these declarations, or hesitate to regard them, uncontradicted, as conclusive. Their probative force would not be questioned. Unlike much other evidence equally cogent for all the purposes of moral conviction, they have the sanction of law as well as of reason." Although that decision has been the object of much adverse criticism by able jurists, we are convinced that it is sound in principle, is in accord with common sense, and has become the prevailing rule. *State v. Martin* (Mo. Sup.) 28 S. W. 12; *Entwhistle v. Feighner*, 60 Mo. 214; *Harriman v. Stowe*, 57 Mo. 93; *Johnson v. State* (Wyo.) 58 Pac. 761; *Lewis v. State* (Tex. App.) 15 S. W. 642, 25 Am. St. Rep. 720; *Com. v. Wertz* (Pa.) 29 Atl. 272; *Linderberg v. Min. Co.* (Utah) 33 Pac. 692; *Railway Co. v. Buck* (Ind.) 19 N. E. 453, 2 L. R. A. 520, 9 Am. St. Rep. 883; *O'Connor v. Ry. Co.*, 27 Minn. 166, 6 N. W. 481, 38 Am. Rep. 288; *Hermes v. Ry. Co.* (Wis.) 50 N. W. 584, 27 Am. St. Rep. 69; *Keyes v. City*, 107 Iowa, 511, 78 N. W. 227; *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49; *Pierce v. Van Dusen*, 78 Fed. 693, 24 C. C. A. 280; *Keyser v. Ry. Co.* (Mich.) 33 N. W. 867; *Railway Co. v. Leverett*, 48 Ark. 333, 3 S. W. 50, 3 Am. St. Rep. 230. We think the evidence objected to was admissible under the rule recognized by the foregoing authorities, all of which are in accord with the views expressed by this court in *Balding v. Andrews*, 12 N. D. 268, 96 N. W. 305.

The foregoing opinion disposes of all the assignments of error which appear to us to have any merit.

We find no error in the record, and the judgment is accordingly affirmed. All concur.

(102 N. W. 165.)

JAMES MOORE, EXECUTOR OF THE LAST WILL OF DONALD McFADGEN, DECEASED, v. HERBERT WESTON AND PHEBE E. A. WESTON.

Opinion filed Oecember 10, 1904. .

Testamentary Disposition of Property Can Be Made Only by Will.

1. Upon the back of a promissory note payable on demand there was written an unsigned memorandum to the effect that, if the note was not paid in full before the payee's death, the makers should expend the amount due on the note for payee's funeral expenses and for a monument, and for caring for the lot in which he was buried. *Held*, that the terms of the memorandum, under the facts of this case, do not constitute a defense to the note, although complied with after the payee's death, as such memorandum was a testamentary disposition of property, and invalid unless made by will.

Authority of Agent — Termination by Death.

2. The defendants were to be made the agents of the payee of the note to carry out the provisions of the memorandum after his death, but such agency never became operative, as death terminated the authority which purported to create it.

Appeal from District Court, Barnes county, *Winchester*, Special J. Action by James Moore, executor of Donald McFadgen, against Herbert Weston and Phebe E. A. Weston. Judgment for plaintiff. Defendants appeal.

Affirmed.

Young & Wright, for appellants.

One seeking to recover upon an express contract must plead all of its terms, and if any appear on the face to defeat plaintiff's right to recovery he must plead the facts that take the contract out of the exception. Bliss on Code Pleading, 202; 4 Enc. Pl. & Pr. 919.

It was error to admit the note in suit over objection with the defeating condition thereon. It was error to refuse the admission of the inscription on the back of the note. *Blake v. Coleman*, 22 Wis. 396; *Wait v. Pomeroy*, 20 Mich. 425, 4 Am. Rep. 395; *Franklin Savings Institution v. Reed*, 125 Mass. 365; *Selover Negotiable Instruments Law*, section 93.

A note made payable after the payee's death is not testamentary in character and is enforceable. *Miller v. Western College of Toledo*, 52 N. E. 432, 69 Am. St. Rep. 242; *Carnwright v. Gray*, 127 N. Y. 92, 27 N. E. 835, 12 L. R. A. 845, 24 Am. St. Rep.. 424; *Krell v. Codman*, 14 L. R. A. 860; *Perry v. Cross*, 132 Mass. 454.

Winterer & Winterer, for respondent

The stipulation or indorsement is absolutely void as being an attempt to dispose of the proceeds of a note after the death of the payee and being revocable and testamentary in its character. Schuyler on Wills, section 274; Jarman on Wills, 26; Hunt v. Hunt, 4 N. H. 434, 17 Am. Dec. 438; Priester v. Holeck, 75 N. Y. S. 405; Crispin, Adm'r, v. Winkleman, 10 N. W. 919; Knight v. Tripp, 54 Pac. 267; Comer v. Comer, 11 N. E. 848; Roberts v. Coleman, 16 S. E. 482; Tuttle v. Raish, 90 N. W. 66.

MORGAN, C. J. Action upon a promissory note. On the back of the note was written the following unsigned memorandum, viz.: "It is hereby stipulated if this note is not paid in full before the death of the owner, then the makers of this note shall first pay all funeral expenses, the balance to be used for a monument and otherwise caring for the lot, which shall discharge the full indebtedness of this note." The executor of the estate of Donald McFadgen, the payee, brings the action on the note, and pleads the note as the cause of action, and entirely disregards the memorandum as a part of the note. Defendants answer, and plead the memorandum written on the note as a defense, and allege that the note has been entirely paid by them by complying with the terms of the memorandum. The trial court refused to admit the memorandum in evidence, and refused to admit any evidence in regard to it, and directed a verdict for the plaintiff for the full amount due on the note as shown by its face. A motion for a new trial was made, based upon a settled statement of the case, and the motion was denied. The appeal is from the judgment entered on the verdict. The ground urged for a reversal of the judgment is that full effect should have been given to the memorandum written on the back of the note. It is claimed that this memorandum should be considered as a part of the note, and, if so considered, a valid contract was entered into between the parties, under which no recovery can be had on the contract unless the makers have failed to expend the proceeds of the note, as directed by the payee, in case of his death before the note was paid. Conceding, for the purposes of this case only, that the memorandum is to be considered as incorporated into the terms of the note, and was written there when the note was signed, we are unable to reach the conclusion that the memorandum can be enforced under the circumstances of this case. The note was payable on demand. It was the property of the payee when he died

on January 25, 1903, about six weeks after the note was given. It was under his control, and could have been disposed of by him at any time up to his death. He had made no absolute disposition or application of the debt evidenced by the note during his lifetime for the purpose indicated by the memorandum. The title to the note was in him at all times. There has been no delivery of the money represented by the note for the purpose shown by the memorandum. Primarily, the money was given to the makers as a loan to be paid on demand. The makers were constituted the payee's agents to expend the money, for the purposes shown by the memorandum upon his death. The agency was not to go into effect until his death, but by his death the authority terminated. The memorandum therefore was an attempt to dispose of his property upon his death without the formality of a will. It was not effectual for that purpose. If there had been an irrevocable delivery of the money for the purpose named in the memorandum, a different question would be before us. But he controlled this property during his lifetime, and the law took hold of it for the purposes of administration upon his death. The estate cannot be administered by an agent appointed in this manner. The attempted appointment of an agent became nugatory upon the death of the principal. No valid agency was created. "We think it may be declared a general rule that, if the intended disposition of property be of a testamentary character, not to take effect in the testator's lifetime, such disposition will be inoperative, unless declared in writing in conformity with the statute relating to wills." *Comer v. Comer* (Ill.) 11 N. E. 848. "She did not, by this act, make a gift of the money to the defendant, but constituted him her agent to make the payments for the purpose and to the persons named in the memorandum, in the event of [her] death; and only after the 'instructions' thus given by her had been carried out was any property remaining to belong to the defendant. Such disposition of her estate was testamentary, and could not be made orally. The defendant was merely her agent to carry out her instructions, and upon her death his agency terminated, and the money remained a part of her estate, subject to administration." *Knight v. Tripp* (Cal.) 54 Pac. 267. See, also, *Perry on Trusts*, section 92; *Hart v. Ketchum* (Cal.) 53 Pac. 931; *Crispin v. Winkleham* (Iowa) 10 N. W. 919.

The judgment is affirmed. All concur.

(102 N. W. 163.)

JOHN TRACY v. W. A. SCOTT AND H. O. WHEELER.

Opinion filed December 12, 1904.

Special Proceeding.

1. The procedure by which an injunction against the foreclosure of a mortgage by advertisement may be obtained under section 5845, Rev. Codes 1899, is not a special proceeding within the meaning of that term as used in the Code.

Appealable Order.

2. An order denying a motion to vacate such injunctional order is not appealable.

*ON PETITION FOR REHEARING.***Costs.**

3. The respondent is entitled to costs upon the dismissal of an appeal from an order which is not appealable.

Appeal from District Court, Barnes county; *Glaspell, J.*

Action by John Tracy against W. A. Scott and H. O. Wheeler.
Judgment for plaintiff and defendants appeal.

Dismissed.

J. E. Robinson, for appellants.

Winterer & Winterer, for respondent.

engerud, J. Appellants commenced proceedings to foreclose a mortgage of real property by advertisement under the power of sale contained in the mortgage. The respondent obtained from the judge of the district court an order enjoining further proceedings under the power of sale. The order was applied for and issued under the provisions of section 5845, Rev. Codes 1899, which provides, in substance, that when, in case of foreclosure by advertisement, it shall be made to appear to the satisfaction of the judge of the district court by affidavit of the mortgagor, his agent or attorney, that the mortgagor has a legal counterclaim or defense against the collection of the whole or any part of the mortgage debt, such judge may, by an order, enjoin the foreclosure by advertisement, and direct that all further proceedings for the foreclosure be had in the district court. The mortgagee and his attorney, W. A. Scott, thereupon applied to the district court to vacate the injunctional order. The motion was denied, and the mortgagee and his attorney joined in an appeal to this court from an order denying the motion to vacate the injunctional order. The respondent contends that the order appealed from is nonappealable,

and moves to dismiss the appeal. A similar appeal was before this court in *McCann v. Mortgage, Bank & Investment Co.*, 3 N. D. 172, 54 N. W. 1026. The question as to the right to appeal from the order was not discussed by counsel in that case, but the court expressly held that it was not appealable under subdivision 3, section 24, c. 120, p. 309, Laws 1891 (subdivision 5, section 5626, Rev. Codes 1899), and further expressed the opinion that the appeal could be sustained, if at all, only as an appeal from "a final order affecting a substantial right, made in a special proceeding." Subdivision 2, section 24, c. 120, p. 309, Laws 1891 (subdivision 2, section 5626, Rev. Codes 1899). The question has been fully argued before us, and we are satisfied that neither of the subdivisions of section 5626, Rev. Codes 1899, cited above, will sustain this appeal, and that the order is not appealable. The right to appeal does not exist unless its is given by statute. If there is any appeal from the order in question, the right thereto must be found in chapter 14, Code Civ. Proc. (Rev. Codes 1899, sections 5603 5632). The first section (5603) of that chapter limits the right of appeal to judgments and orders "in a civil action or in a special proceeding." Section 5626 still further confines the right of appeal to those judgments and orders specifically enumerated therein. That section, instead of enlarging, restricts the right of appeal, and has reference only to such orders and judgments as are described in general terms in section 5603—judgments and orders in a civil action or in a special proceeding. In view of the numerous decisions of this court involving the meaning of the statutory term "special proceeding," it is very clear that the procedure to obtain the injunctional order provided for in section 5845, Rev. Codes 1899, does not come within the meaning of that term as used in the statute granting the right of appeal. See *State v. Davis*, 2 N. D. 461, 51 N. W. 942; *Myrick v. McCabe*, 5 N. D. 422, 67 N. W. 143; *In re Eaton*, 7 N. D. 269, 74 N. W. 870; *Carruth v. Taylor*, 8 N. D. 166, 77 N. W. 617. The reasoning of the court in the *Eaton* case is applicable to the case at bar. It was a proceeding to disbar an attorney. The proceedings were dismissed, and the defendant claimed that he was entitled to recover his costs and disbursements, because costs were allowed by statute to the successful party in a special proceeding; and he contended that a disbarment proceeding came within the statutory definition of that term. In that case, as in this, attention was called to the provisions of the Code (sections 5155-5157) which

classify remedies into actions and special proceedings, and provide that every remedy other than an action is a special proceeding. The right to costs was denied. Following precedents established by former decisions, the court held "that a remedial proceeding in court, which is neither a civil nor a criminal action, need not necessarily be classed as a special proceeding for all purposes." The court further said (page 274, 7 N. D., page 871, 74 N. W.): "That it was not the legislative purpose, in making the general classification of remedies in court, to settle all details of practice and procedure in such purely statutory proceedings as the legislature might have authorized or might thereafter see fit to authorize, regardless of their objects or character. Doubtless it was the legislative purpose, by this broad classification, to embrace all special proceedings proper, i. e. such proceedings as gave remedies in court through the agency of the remedial writs which had been adopted at the common law, and had, when the Code was adopted, a recognized status and name in court procedure, and which were then well known to the profession under the name of 'special proceedings.' These remedial writs, with their statutory modifications, were clearly in the minds of the Code makers, and are, by universal consent, governed by the provisions of the Code of Civil Procedure so far as the Code attempts to deal with the same, including the regulations governing costs, disbursements, and appeals." That opinion is decisive of the case at bar. The Supreme Court of South Dakota, in the case of *Commercial National Bank v. Smith*, 1 S. D. 28, 44 N. W. 1024, held that an order of this nature was not appealable, because it was an order of the judge, and not an order of the court. It is doubtful if that distinction is possible in this state in view of section 5178, which seems to abolish all distinctions between the acts of a district judge as such and the acts of the court.

It was urged by counsel for appellant that, if the motion to dismiss the appeal should be sustained, we ought nevertheless to retain the papers and pass upon the validity of the injunctive order. A formal motion to that effect has been made. We cannot assume jurisdiction over any controversy in such an arbitrary and anomalous manner. The dismissal of this appeal does not preclude the appellant from seeking and obtaining such relief from the order complained of as he may be entitled to in appropriate proceedings.

The appeal is dismissed. All concur.

ON PETITION FOR REHEARING.

The respondents are entitled to the costs of this appeal. Section 5582, Rev. Codes 1899, provides: "When an action has been dismissed from any court for want of jurisdiction or because it has not been regularly transferred from an inferior to a superior court, the costs must be adjudged against the party attempting to institute or bring up the action." We think this statute was intended to apply to cases such as the one at bar. It was plainly designed to authorize the court to allow costs to the prevailing party where he has been improperly brought into any court, and to vest the court with jurisdiction to the extent of allowing costs, although it has no jurisdiction of the merits. This being the plain intent of the law, it is the duty of the court to so construe the language used as to "effect its object and to promote justice." Rev. Codes 1899, section 5147. The word "action" was evidently not used in its technical sense, but in this connection means any form of proceeding instituted in court. This construction does not conflict with the Eaton case, 7 N. D. 269, 74 N. W. 870. In that case the appeal was not dismissed for want of jurisdiction, but costs were refused to the party prevailing on the merits by reason of the "anomalous and wholly unique character of a disbarment proceeding."

The petition for rehearing is denied. All concur.
(101 N. W. 905.)

W. IRA BROWN V. J. C. SMITH AND RUSSELL & COMPANY.

Opinion filed December 14, 1904.

Second Mortgage May Redeem Under Section 5894, Rev. Codes 1899.

1. A second mortgagee has the right to redeem, under section 5894, Rev. Codes 1899, from a chattel mortgage sale by advertisement.

Notice of Intention to Redeem — Time of Service.

2. The notice of intention to redeem required by section 5894, Rev. Codes 1899, is served in time if served as soon after the sale as by reasonably prompt and vigorous exertion the service can be effected.

To Effect Redemption From Chattel Mortgage Sale, Tender of Amount Required Must Be Made Under Section 3814 Rev. Codes.

3. In order to show a complete redemption from a chattel mortgage sale under section 5894, it is not sufficient to prove a tender of the

amount required to redeem, and a refusal to accept; but it must also be proved that the tender was kept good by a deposit of the amount tendered, in accordance with the provisions of section 3814, Rev. Codes.

Appeal from District Court, Benson county; *Cowan*, J.

Action by W. I. Brown against J. C. Smith and Russell & Co. Judgment for plaintiff. Defendants appeal.

Reversed.

W. H. Thomas, for appellants.

The holder of a second chattel mortgage is not an assignee under the provisions of section 5849, and could only redeem the mortgage debt, and this he could not do after a foreclosure sale. *Martin v. Fridley*, 23 Minn. 13; *Collins v. Riggs*, 14 Wall. 491, 20 L. Ed. 723; *Gage v. Brewster*, 31 N. Y. 218.

Notice of intent to redeem was not given in time. Mortgagor or his assignee can only redeem at the time of sale, not after.

Plaintiff's alleged tender was not kept good. It should have been kept good to the time of trial. This was as essential as the tender itself. *Burlock v. Cross*, 26 Pac. 142; *Aulger v. Clay*, 109 Ill. 487; *Lantry v. French*, 33 Neb. 524, 50 N. W. 679; *Sanders v. Bryer*, 25 N. E. 86; *Sanders v. Peck*, 131 Ill. 407; 25 N. E. 508.

McClory, Barnett & Adamson, for respondent.

Redemption was in time. He had a reasonable time after the sale, and thirty-three minutes after the sale was a reasonable time.

It is stipulated that the tender was made and it is a presumption that it continues to exist. Rev. Codes, section 5713c, No. 32.

A subsequent mortgagee is an assignee of the mortgage for the purpose of redemption, the same as he is for the purpose of reclaiming the surplus. *Nichols v. Tingstand*, 10 N. D. 172, 86 N. W. 694; *Nopson v. Horton*, 20 Minn. 268; *Fowler v. Johnson*, 3 N. W. 986; *Brown v. Crookston Agricultural Ass'n*, 26 N. W. 907; *Aultman & Co. v. Siglinger*, 50 N. W. 911.

INGERUD, J. This is an action to recover the possession of a threshing engine, of which the plaintiff claims to be the owner, and which it is alleged the defendants wrongfully withhold. The defendants deny plaintiff's ownership and right to possession, and allege title in the defendant Russell & Co. The issues were submitted to a jury for trial, and the only evidence offered was certain stipulated facts. Plaintiff's motion for a directed verdict in his

favor was granted, and judgment was entered accordingly. The defendants have appealed from the judgment, and assign errors on a statement of the case.

It appears from the pleadings and stipulation of facts that one Michael Giedd was formerly the owner of the property in dispute. The defendant Russell & Co., a corporation, held a first mortgage on the engine for a debt of \$1,000 and interest, which mortgage contained the usual power of sale in case of default in the payment of the debt when due. The plaintiff held a second mortgage on the same property for a debt of \$400 and interest. Both mortgages were given by Michael Giedd, and both were duly filed. On April 28, 1901, the defendant J. C. Smith, acting as agent for Russell & Co., took possession of the engine for the purpose of foreclosing Russell & Co.'s mortgage thereon under the power of sale. The sale was made May 11, 1901, at 2 o'clock p. m., and the engine was bid in for and struck off to Russell & Co., for the sum of \$150. J. C. Smith conducted the sale as agent for the mortgagee, and had possession of the engine for that purpose. When the sale was made, he retained possession of the engine as agent for the purchaser. The engine is worth \$800. At 2:33 o'clock p. m. on the day of sale, the plaintiff served upon Smith a notice of his intention to redeem from the sale, pursuant to section 5894, Rev. Codes 1899. On May 15th the plaintiff inquired of Smith for the amount of costs incurred in the foreclosure, but the latter refused to furnish any information on that subject. Thereupon, on the same day, plaintiff tendered to Smith, to effect redemption, the sum of \$170; \$20 being the estimated costs. The tender was refused. This action followed.

The sole basis for the right of redemption asserted by plaintiff is section 5894, Rev. Codes 1899, which reads as follows: "Any mortgagor of personal property, or his assignee, may redeem the same from a sale upon foreclosure of any mortgage within five days after such sale, exclusive of the day of sale, by paying or tendering to the owner of the mortgage at the time of sale, his agent or attorney, or the person making the sale, the amount for which said property was sold with the costs of sale and interest at the rate of seven per cent per annum from the date of sale. The mortgagor or his assignee desiring to redeem such property shall at the time of sale give written notice to the person making the sale of his desire to make such redemption; otherwise he shall be deemed

to have waived his right to do so. In case such notice is served, the person making such sale shall retain the possession of the property sold until the expiration of said five days, and shall be entitled to his reasonable expenses in caring for the same. In case a part only of the property sold is redeemed, the redemptioner shall pay or tender, in addition to the price for which such part was sold, such a proportion of the costs of sale as said price bears to the entire price of all the property sold, and also the reasonable expense of caring for the property redeemed and interest."

The solution of the problem upon which the controversy hinges depends upon the answers to be given to two questions: (1) Is the plaintiff, by virtue of his chattel mortgage, an "assignee" of the mortgagor, within the meaning of the act? (2) Has the plaintiff complied with all the conditions prescribed by the act to effect a redemption? It is manifest that plaintiff's right is dependent upon an affirmative answer to both these questions. A negative answer to either question is fatal to plaintiff's claim.

The act in question is an innovation, and, so far as we can ascertain, is peculiar to this state. It is a very crude piece of legislation, but the main object is very clear. It was plainly designed to prevent the sacrifice of mortgaged personal property for less than its value at a sale under the power. It is a matter of common knowledge that the power of sale in a chattel mortgage has been often made the instrument of much wrong and oppression. It enables the mortgagor to seize the property and sell it on a notice of six days, without the restraints and safeguards of judicial supervision. The advantage which the mortgagee has over other bidders has a tendency to prevent competition in bidding. Where the debt equals or exceeds the value of the property, the mortgagee will, as a rule, outbid other bidders, so as to get the property, or its full value, for himself. The result is that the mortgagee seldom has any competition at the sale, and is at liberty to buy the property for any sum he sees fit, however insignificant the price may be. The facts of this case furnish a good example of the evils which the law was designed to remedy. The first mortgage exceeded the value of the property. The circumstances of the debtor were such that he either could not or would not redeem. The second mortgagee was effectually barred from redeeming before sale, because, in order to do so, he would have to pay the full amount due on the first mortgage, which was at least \$200 more than the property was worth. The

mortgagee sought to take advantage of the situation by bidding only \$150 for property worth \$800. There was no inducement for others to bid, because there was no probability that they could get the property for less than its full value. If the defendant's plan of operation shall succeed, the mortgagee will have obtained property worth \$800, and the mortgagor's notes will still be almost wholly unpaid. The law was designed to enable persons interested in the property to protect themselves against such unfair dealing. The purpose of the law was therefore highly beneficent, and, like all remedial legislation, should receive a liberal construction. The law in question is part of the Code of Civil Procedure, and one of the first sections of that Code (section 5147, Rev. Codes 1899) states the rule to be followed in the interpretation of the provisions of that Code in the following language: "The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed with a view to effect its objects and to promote justice." Bouvier's Law Dictionary (Rawle's Revision) gives the following definitions: An assignee is "one to whom an assignment has been made;" and an assignment is "a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein." In *Brown v. Association*, 34 Minn. 545, 26 N. W. 907, a second mortgagee was held to be entitled to the surplus arising from a foreclosure sale under a statute which required such surplus to be paid to the mortgagor, his legal representatives or assigns. The court said: "The term 'assigns' is of sufficiently broad signification to include the second mortgagee. * * * And 'assigns' has been deemed to comprehend all those who take either immediately or remotely, from or under the assignor, whether by conveyance, devise, descent or act of law." This court reached the same conclusion in *Nichols v. Tingstad*, 10 N. D. 172, 86 N. W. 694. We have no hesitation in holding that the plaintiff, as second mortgagee, is an "assignee" of the mortgagor, within the meaning of this statute. He is clearly within the class of persons which the statute designed to protect, and the language is sufficiently broad to comprehend him within its terms.

The appellant, however, asserts that the plaintiff has no cause of action because he did not serve the notice of intention to redeem

upon Smith "at the time of the sale." The appellant contends that the words "at the time of the sale" can have no other meaning than during, simultaneous with, or immediately before the sale, and consequently the service of the notice within thirty-three minutes after the sale was ineffectual. It is obvious that the words "at the time of sale" cannot be taken literally. Such an interpretation would lead to the absurd result that the intended redemptioner must serve the notice upon the auctioneer the instant the hammer falls. We are forced by the necessity of the situation to depart from the literal meaning of the words. In which direction shall the departure be made? Shall we say the fall of the hammer terminates the right of redemption, and thus restrict and narrow the scope of the act? Or shall we take a more liberal view of it, and say that the fall of the hammer marks the beginning of the period of time within which the notice must be served? The rule for interpretation laid down by section 5147, above quoted, is decisive. That interpretation must be adopted which will best effect the object of the law and promote justice. It cannot be known until the sale is made whether there has been a sacrifice of the property or not. Ordinarily the right to redeem would not be exercised except to prevent a sacrifice. It is unreasonable to require the person who is entitled to redeem to give notice that it is his intention to redeem before he knows whether he will avail himself of the right. The law itself is sufficient notice to bidders that the right to reclaim the property exists, and that the right will probably be exercised if the property does not bring its fair value. If the property does not bring its fair value, it is certainly promotive of justice and in accordance with the object of the law to permit redemption. We are clear that the phrase "at the time of sale," taken in connection with the context and the intent of the law, should be construed to convey the same meaning as the word "forthwith" or "immediately" would convey if used in the same connection. These terms are stronger than the expression "within a reasonable time," and imply prompt, vigorous action, without any delay. So construed, the statute is complied with if the notice is served as soon as by reasonably prompt and vigorous exertion it may be accomplished. Bouvier's Law Dictionary (Rawle's Revision), p. 834. See, also, definition of "immediate" and "immediately" in the same dictionary. We have no hesitation in holding, as a matter of law, that, under the circumstances of this case, the notice

was served in time. The preparation and service of the notice within thirty-three minutes shows prompt and vigorous exertion. It follows, therefore, that the plaintiff was entitled to make redemption.

There is no proof in the record that the plaintiff deposited the money tendered for redemption in a bank of good repute, payable to defendants. The appellant assigns this defect of proof as a ground for reversal, and we think the point is well taken. The statute imposes on the redemptioner the obligation to pay the amount required to redeem as a condition precedent to the acquirement of any right to the property sold. It was incumbent on the plaintiff, therefore, to show that the obligation which the statute imposed on him had been extinguished. Section 3814, Rev. Codes 1899, provides: "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor with some bank of deposit within this state of good repute, and notice thereof is given to the creditor." Section 3818 provides: "An obligation for the delivery of money * * * is not discharged by an offer of performance, nor any of its incidents affected, unless the thing offered, if money, is deposited as provided in section 3814. * * *" The respondent argues that, inasmuch as the stipulated facts show that a tender was made, it must be presumed that the offer of the money was followed by a proper deposit in the absence of a denial of such deposit by the defendant. That argument is based on the erroneous assumption that the act of tender, under our statutes, includes the deposit of the money. The Civil Code has not changed the definition of the term "tender." That term still means what it always meant—an offer of performance. The Code has substituted the requirement of deposit of the thing tendered, at the risk of the creditor, in place of the common-law requirement that a tender must be kept good by a readiness to pay and payment into court. The Code has also made this further innovation on the common law with respect to the effect of a tender; that a mere tender of the debt is no longer sufficient, as at common law, to extinguish a mortgage or pledge of property, but, to have that effect, the tender must be kept good by a deposit of the thing tendered, subject to the order of the creditor. Section 3814, quoted above, provides that, in the absence of a deposit, an obligation is not discharged, "nor any of its incidents affected," by a mere offer of performance. In harmony with this rule, we find that section 4693, relating to the redemption of liens, provides that, if the amount secured requires

the delivery of money, an offer to pay must be followed by a deposit of the money, as prescribed in section 3814. It follows therefore, that, for this failure to prove the deposit of the money tendered, there must be a new trial.

The judgment is reversed, and a new trial ordered. All concur. (102 N. W. 171.)

J. H. BOSARD v. CITY OF GRAND FORKS.

Opinion filed December 19, 1904.

Cities — Attorney's Compensation — Liability.

1. A city is not liable upon an implied contract to pay the reasonable value of professional services rendered by an attorney other than the city attorney in advising the mayor and aldermen, where his employment has not been authorized or ratified by ye and nay vote of the common council.

Appeal from District Court, Grand Forks county; *Fisk, J.*

Action by J. H. Bosard against the city of Grand Forks. Judgment for plaintiff. Defendant appeals.

Reversed.

George A. Bangs, for appellant.

A contract with a city is void, which is entered into without prior provision therefor in the appropriation bill and tax levy. *Engstad v. Dinie*, 8 N. D. 1, 76 N. W. 292; *Roberts v. City of Fargo*, 10 N. D. 230, 86 N. W. 726; *City of Fargo v. Keeney*, 11 N. D. 484, 92 N. W. 836.

The retention of the fruits of the contract does not subject the corporation to liability. *Goose River Bank v. School Twp.*, 1 N. D. 26, 44 N. W. 1002, 26 Am. St. Rep. 605; *Tennant v. Crocker*, 48 N. W. 577; *Blandon v. Philadelphia*, 60 Pa. St. 464; *Litchfield v. Ballou*, 114 U. S. 190, 29 L. Ed. 132.

If the municipality is to be held liable, the statute requiring the contract to be in writing and signed or countersigned by the city auditor should be enforced. *City of Blair v. Lantry*, 31 N. W. 790; *Gutta-Percha & Rubber Mfg. Co. v. Village of Ogalalla*, 59 N. W. 513; *Durango v. Pennington*, 7 Pac. 14; *Sullivan v. City of Leadville*, 18 Pac. 737; *City of Findlay v. Pendleton*, 56 N. E. 649; *Arnott v. City of Spokane*, 33 Pac. 1063; *Bryan v. Paige*, 51 Tex. 532; 32 Am. Rep. 637; *Zottman v. City of San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; 1 Dillon on Mun. Corporations, sections 459,

460 and 461; Tiedeman on Mun. Corporations, sections 163, 164 and 165; 15 Am. & Eng. Enc. Law, 1082.

B. G. Skulason and R. H. Bosard, for respondent.

There is no proof that the work was gratuitous, and on a request for services of such a nature there is an implied promise to pay the value of the services. *Grundy v. Pine Hall Coal Co.*, 9 S. W. 414; *Masterson v. Masterson*, 15 Atl. 652; *Bank of Columbia v. Paterson*, 7 Cranch, 299, 3 L. Ed. 351.

The power of protecting the interests of a city by employment of counsel is not denied to the city authorities. *Smith v. Mayor of Sacramento*, 13 Cal. 531; *Wiley v. City of Seattle*, 7 Wash. 576, 35 Pac. 415, 38 Am. St. Rep. 905; *City of Mound City v. Snoddy*, 35 Pac. 1112.

A city may be bound by implied contracts to be deduced by inference from corporate acts, without either vote, deed or writing. *Bank of Columbia*, 7 Cranch. 299, 3 L. Ed. 351; *Bank of United States v. Dandridge*, 12 Wheat. 64, 6 L. Ed. 553; *Perkins v. Washington Ins. Co.*, 4 Cow. 645; *American Insurance Co. v. Oakley*, 9 Paige. 496; *Magill v. Kauffman*, 4 Serg. & Rawle, 317; *Randall v. Van Fechten*, 19 Johns. 60.

Unless prohibited by charter, a municipal corporation is liable when a person is employed by one assuming to act for it, and where such services are rendered under the agreement, with the knowledge of the officers, and without notice that the agreement is not recognized as valid and binding. *Beers v. Dalles City*, 18 Pac. 835; *Ward v. Town of Forest Grove*, 25 Pac. 1020; *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 453; *Tyler v. Trustees*, 14 Ore. 485, 13 Pac. 329; *Pixley v. Western Pac. R. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623; *Cincinnati v. Cameron*, 33 Ohio St. 336; *Argente v. City of San Francisco*, 16 Cal. 256.

INGERUD, J. Action to recover the reasonable value of professional services which the complaint alleges were performed by the firm of Bosard & Bosard at the request and for the benefit of the city of Grand Forks, and which claim was assigned to plaintiff, who is a member of the firm. The answer denies the performance of any services, and further denies any liability on the part of the city, on the ground that, if any services were rendered pursuant to any request of any of the officers of the city, such employment was void for want of authority in the officers to create any liability

against the city. The defendant moved for a directed verdict, which was denied, and a verdict was returned awarding plaintiff the full amount demanded. Defendant thereupon moved for judgment notwithstanding the verdict, or for a new trial. The motion was denied, and judgment was entered on the verdict. The appeal is from the judgment.

The facts developed on the trial are as follows: Certain persons had applied to the mayor and council of the city of Grand Forks for a franchise to construct and operate a street railway in that city. The city attorney was at the time temporarily absent, and the date of his return was uncertain. The proposed franchise ordinance had passed its first reading, and the applicants for the franchise, as well as the mayor and some of the members of the council, were desirous of final action on the proposed franchise as speedily as possible. The city attorney being still absent, and the time when he would return uncertain, the mayor requested the plaintiff, as senior member of the firm of Bosard & Bosard, to meet with the ordinance committee of the council for the purpose of advising that committee with respect to the proposed franchise, and to suggest and frame proposed amendments thereto, to be submitted to the council for adoption. Pursuant to this request, the plaintiff spent much time and labor in examining precedents, drafting amendments, and advising with the committee. He also appeared before the council, and gave it his opinion and advice in respect to the questions which arose before that body concerning the ordinance. In short, the plaintiff, from the time he was requested to act until the return of the city attorney, acted as the legal adviser of the council in all matters pertaining to the proposed franchise. There was no dispute as to the fact that plaintiff did the work he claims, and that his charge therefor is reasonable. The only question is as to the city's liability. It is conceded that there was never any express contract entered into between the city, or any of its representatives, and the plaintiff, and it is also conceded that there was never any formal action taken by the council by resolution or otherwise expressly authorizing or ratifying plaintiff's employment. Respondent, however, contends that the city is liable on an implied contract, because services beneficial to the city were rendered at the request of the mayor, with knowledge of the council, and were by the latter accepted. The only facts relied upon to show acceptance are that the members of the council knew that the plaintiff had been requested by the mayor to act in the place of the city attorney, and also knew, or

ought to have known, that the city was expected to pay the reasonable value of the services; and the members of the council, with this knowledge, availed themselves of plaintiff's professional labor and advice. These facts are insufficient to create any contract, express or implied, on the part of the city to pay for plaintiff's services. The statute governing cities provides that no liability can be created against a city, or any expenditure or appropriation of its funds can be made, unless the proposition to do so is adopted by a ye and nay vote, which vote must be entered on the journal of the proceedings. Rev. Codes 1899, section 2143. There are doubtless cases in which a city may be impliedly liable notwithstanding the failure of its officers to observe the statutory requirements as to the method and form of contracting in its behalf; but this is not such a case. The law of implied municipal liability is clearly stated by Chief Justice Field in the case of *Argenti v. San Francisco*, 16 Cal. 255, as follows: "The doctrine of implied municipal liability applies to cases where money or other property of a party is received under such circumstances that the general law, independent of contract, imposes the obligation upon the city to do justice with respect to the same. * * * In reference to money or other property it is not difficult to determine in any particular case whether a liability with respect to the same has attached to the city. The money must have gone into her treasury, or been appropriated by her; and when it is property or other than money it must have been used by her or be under her control. But with reference to services rendered the case is different. Their acceptance must be evidenced by ordinance to that effect. If not originally authorized, no liability can attach upon any ground of implied contract. The acceptance, upon which alone the obligation to pay could arise, would be wanting. As a general rule, undoubtedly, the corporation is only liable upon express contracts, authorized by ordinance. The exceptions relate to liabilities from the use of money or other property which does not belong to her, or to liabilities springing from the neglect of duties imposed by the charter, from which injuries to parties are produced. There are limitations even to these exceptions in many instances, as where property or money is received in disregard of positive prohibitions." In the foregoing statement of the law the learned jurist evidently used the term "ordinance" in the broad sense of formal corporate action, and did not intend to convey the idea that in all cases an ordinance in the strict sense was necessary to create a liability. The same question is further discussed by the same judge in *Zottman*

v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96, where the circumstances were analogous to the case at bar. See, also, 1 Dillon on Municipal Corporations (4th Ed.) section 459 et seq. However valuable the services of the respondent may have been to the city in this instance, to hold the city liable for them would be to override the law, and to destroy one of the strongest safeguards cast about the expenditure of public funds. It is doubtless true that the professional labor and advice of the plaintiff enabled the mayor and aldermen to frame and enact an ordinance more advantageous to the city than could have been framed without his assistance. In this sense the city has been benefited. But if the city is to be held liable for all legal advice sought and received by its officers on the theory that it has, by reason of such advice, received the benefit of wiser and more intelligent official action, the demands upon the municipal treasury would exceed all bounds.

We refrain from expressing any opinion as to how, and under what circumstances, a city may be made liable in this state for the professional services of a lawyer other than the city attorney. The determination of that question is not necessary to the disposition of this case. We are agreed that under the circumstances of this case no express or implied liability exists.

It is accordingly ordered that the judgment be reversed, and that judgment be entered dismissing the action on the merits. All concur.

(102 N. W. 164.)

JAMES T. MORRISON v. P. P. LEE.

Opinion filed December 21, 1904.

General and Special Verdict.

1. In returning a general verdict, the jury apply the law to the facts, and pronounce generally upon all of the issues. In a special verdict they "find the facts only," and the trial judge determines their legal effect.

Instruction Should Be Appropriate to the Character of the Verdict Required — Legal Conclusions in Verdict.

2. Where a case is submitted for a special verdict, general instructions are not proper. The jury should only be given instructions which are appropriate to the question which they are to answer, and it is error to inform them as to the effect their answers will have upon

the ultimate rights of the parties, or to authorize them to answer in the form of a legal conclusion.

General Instructions — Special Verdict.

3. In an action tried as one to recover for an injury resulting from defendant's negligence, the jury were given general instructions; and, as part of their special verdict, they were instructed to answer whether the plaintiff "was guilty of such contributory negligence as would bar him from recovery under the law as laid down in the instructions." *Held* error.

Complaint Construed.

4. Complaint construed, and *held* to charge an intentional injury, and not an injury resulting from negligence.

Appeal from District Court, Ward county; *Palda, Jr., J.*

Action by James T. Morrison against P. P. Lee. Judgment for plaintiff; defendant appeals.

Reversed.

James Johnson and *Guy C. H. Corliss*, for appellant.

Respondent cannot recover under chapter 128, Laws of 1901, as the statutory elements, viz: knowingly selling illuminating oil below 105 degrees Fahrenheit, are not set forth in the complaint, or proven. And further, the party predicated his recovery upon a statutory duty must show that the violation thereof was the proximate cause of his injury. 21 Am. & Eng. Enc. Law, 480; 1 Sher. & Redf. on Negligence, section 27; *Stone v. Boston & A. R. Co.*, 51 N. E. 1.

If the case is one of negligence, the burden is on plaintiff to show not only defendant's negligence but that it was the proximate cause of his injuries. *Elliott v. Allegheny, etc., Co.*, 54 Atl. 278; *Afflick v. Bates*, 43 Atl. 539; *The Saratoga* —, 36 C. C. A. 208; *Loftus v. Dehail*, 65 Pac. 379; *Rider v. Syracuse Rapid Transit Co.*, 63 N. E. 836.

The sale of the oil with gasoline in it was not the proximate cause of plaintiff's injuries. 1 Sher. & Redf. on Negligence, section 26; 1 Thomp. on Neg. sections 44, 45; 21 Am. & Eng. Enc. Law, 483, 485; 1 Sher. & Redf. on Neg. section 28; 21 Am. & Eng. Enc. Law, 489; 1 Thompson on Neg. section 57; *Stone v. Boston & A. R. Co.*, 51 N. E. 1; *Deisenreiter v. Kraus-Merkel Malting Co.*, 72 N. W. 735; *Georgia Southern & Florida Ry. Co. v. Cartledge*, 59 L. R. A. 118.

Whether the plaintiff was negligent, and whether his negligence was the proximate cause of his injury, or contributed proximately

to it, is a question for the court where the facts are undisputed, and different inferences cannot be drawn. 21 Am. & Eng. Enc. Law, 509; *Campbell v. Abbott*, 57 N. E. 462; *Neylon v. Phillips*, 60 N. E. 616; *Schneider v. Chicago, M. & St. P. Ry. Co.*, 75 N. W. 169; *Piper v. N. Y., C. & H. Ry. Co.*, 50 N. E. 851; *Brugher v. Buchtenkirch*, 60 N. E. 420; *Rider v. Syracuse Rapid Transit Co.*, 63 N. E. 836; *Daley v. Kinsman*, 65 N. E. 385; *Ramsey v. Eddy & Sons*, 82 N. W. 127; *Gleason v. Boehm*, 34 Atl. 886; *Price v. Standard Life & Accident Ins. Co.*, 99 N. W. 887; *Tuttle v. Travelers Ins. Co.*, 134 Mass. 175, 45 Am. Rep. 316; *Shevlin v. American Mut. Acc. Ass'n*, 68 N. W. 866, 36 L. R. A. 52; *Cleveland, etc., Ry. Co. v. Ballentine*, 84 Fed. 935.

If pouring explosive oil upon fire was negligence in fact, it was the proximate cause of the injury. *Holmes v. South. Pac. Coast Ry. Co.*, 97 Cal. 161, 31 Pac. 834; *Phinney v. Illinois Cent. Ry. Co.*, 98 N. W. 358; *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 44, 19 L. Ed. 65.

It is sufficient if the plaintiff's negligence was one of the proximate causes of the injury. *Hickman v. Evanson*, 7 N. D. 173, 73 N. W. 427; *Beach Con. Neg.* section 26; 1 *Sher. & Redf. on Neg.* section 96; 7 *Am. & Eng. Enc. Law*, 383; *Schneider v. Chicago, etc., Ry. Co.*, 75 N. W. 169; *Deisenreiter v. Krans-Merkel M. Co.*, 72 N. W. 735; *Ward v. Chicago, M. & St. P. Ry. Co.*, 78 N. W. 442; *Meyer v. Milwaukee Electric Ry. & Light Co.*, 93 N. W. 6; *Mauch v. City of Hartford*, 87 N. W. 816.

Under section 5445, Rev. Codes 1899, a special verdict was demanded and the demand complied with by the court. The object of this statute is, that the jury shall not determine through sympathy or prejudice in whose favor they wish to decide the case, and then, without reference to the rules of law or the facts, render such a general verdict. This object is thwarted, if the jury are allowed to see by the instructions of the court, or the form of the questions put, what legal bearing answers to specific questions will have upon the ultimate and general question of the defendant's liability. *Yerkes v. Northern Pac. Ry. Co.*, 88 N. W. 33; *Ward v. Chicago, M. & St. P. Ry. Co.*, 78 N. W. 442; *Coats v. Town of Stanton*, 62 N. W. 619; *Musbach v. Wisconsin Chair Co.*, 84 N. W. 36; *Baxter v. Chicago & N. W. Ry. Co.*, 80 N. W. 644; *New Home Sewing M. Co. v. Simon*, 80 N. W. 71; *Mauch v. City of Hartford*, 87 N. W. 816; *Sladky v. Marinette Lumber Co.*, 83 N. W. 514.

The submission of general propositions of law, suitable only to a general verdict, tends to defeat the purposes of the law. *Baxter v. Chicago & N. W. Ry. Co.*, 80 N. W. 644; *New Home Sewing M. Co. v. Simon*, 80 N. W. 71; *Crause v. Chicago & N. W. Ry. Co.*, 78 N. W. 446; *Musbach v. Wisconsin Chair Co.*, 84 N. W. 36; *Byington v. City of Merrill*, 88 N. W. 26; *Cullen v. Hanisch*, 89 N. W. 900.

LeSueur & Bradford, for respondent.

Plaintiff's theory is, that the statutes of this state forbid the sale of kerosene oil that will flash at a less temperature than 120 degrees Fahrenheit, also the sale of oil uninspected. The plaintiff in purchasing this oil of defendant entered into a contractual relation. The inspection laws of the state entered into their agreement. The defendant having failed to keep his agreement with plaintiff is liable in damages for a sum sufficient to compensate the latter for the damage sustained by the tortious breach of such contractual relation, provided such breach was the proximate cause of the injuries sustained by the plaintiff. If the statute fails to furnish a remedy, the common law will. *Cooley on Torts*, section 657.

The handling of explosives is akin to the handling of deadly poison, and the same degree of care is required. *Sherman & Redfield on Negligence*, section 592; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455.

It is not contributory negligence if the plaintiff has merely not anticipated defendant's negligence. *Robinson v. Western Pac. Ry. Co.*, 48 Cal. 409; *Shea v. Potrero Bay View Ry. Co.*, 44 Cal. 414; *Battishill v. Humphreys*, 38 N. W. 581; *Thurman v. Louisville & N. Ry. Co.*, 34 S. W. 893; *Chicago, St. Louis & P. Ry. Co. v. Bills*, 20 N. E. 775; *Beach on Contributory Negligence*, section 22; *Bennett v. N. P. Ry. Co.*, 3 N. D. 91, 54 N. W. 314; *Central R. R. & Banking Co. v. Newman*, 21 S. E. 219.

Negligence, as an almost universal rule, is a mixed question of law and fact, and when the facts are doubtful in any degree they should be submitted to the jury. *Fernandes v. Sacramento City Ry. Co.*, 52 Cal. 45; *Wellington v. Dosner Kerosene Oil Co.*, 104 Mass. 64; *Fuchs v. St. Louis*, 34 L. R. A. 118; *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536.

And this is true of contributory negligence. Contributory negligence is not a defense, where the defendant was charged with a statutory duty which plaintiff had a right to presume he had

observed. *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536; *Hourigan v. Nowell*, 110 Mass. 470; 1 Thompson on Negligence, section 8.

What is proximate cause of injury is usually a question for the jury. *Denver T. & G. Ry. Co. v. Robbins*, 30 Pac. 261; *Siemers v. Iesen*, 54 Cal. 418; *Clements v. Louisiana Electric Light Co.*, 16 L. R. A. 43; *Osborne v. McMasters*, 41 N. W. 543; *Tobey v. Burlington, C. R. & N. Ry. Co.*, 33 L. R. A. 496.

Wanton recklessness or a grossly careless disregard of the safety and welfare of the public or the rights of others is equivalent to an intentional violation of such rights. 1 Thompson on Negligence, section 20; *Ives v. Welden*, 54 L. R. A. 854; *Hartlove v. Fox & Son*, 24 L. R. A. 679; *East St. Louis Connecting Ry. Co. v. O'Hara*, 37 N. E. 917; 1 Thompson on Negligence, section 45; *Heckman v. Evenson*, 7 N. D. 173, 73 N. W. 427; 1 Thompson on Negligence, sections 46, 48, 208, 239; *Denver & R. G. Ry. Co. v. Spencer*, 52 Pac. 211; *Kansas Pac. Ry. Co. v. Whipple*, 18 Pac. 730; *Texas & Pacific Ry. Co. v. Carlin*, 60 L. R. A. 462.

YOUNG, J. This is an action to recover damages for personal injuries suffered by the plaintiff through an explosion of oil which he alleges he purchased from the defendant as kerosene, but which he claims was a mixture of kerosene and gasoline. Upon the demand of the defendant, the trial court submitted the case to the jury for a special verdict. The special verdict consists of eleven questions prepared by the court, and each question was answered by the jury. Upon the return of the special verdict, both parties moved for judgment. The defendant's motion was denied, and that of the plaintiff was granted, and judgment entered in his favor for the sum of \$4,750 and costs. Defendant moved for a new trial. This motion was denied. Defendant appeals.

Upon the motion for new trial, the defendant attacked the sufficiency of the evidence to justify the verdict, and also specified a large number of alleged errors in the admission and exclusion of evidence and in the instructions, and all of them are urged as grounds for reversal upon this appeal. It will be necessary to a proper understanding of the questions involved to set out the complaint and answer, and also the special verdict upon which the judgment rests.

The complaint alleges:

"(1) That the defendant is * * * engaged in selling * * * oils commonly called 'kerosene' and 'gasoline' for domestic use and consumption. * * *

"(2) That between the 20th day of November, 1902, and the 2d day of December, 1902, the defendant * * * did, by his employes, * * * falsely, maliciously and with intent to endanger the life and property of plaintiff, sell to plaintiff as and for kerosene and representing the same to be kerosene, and upon plaintiff's request for kerosene, one gallon of a mixture of kerosene and gasoline, to be used for domestic use and consumption by plaintiff, as defendant well knew; that such mixture was explosive and dangerous.

"(3) That * * * the defendant and his employes, wilfully and with gross negligence, and with intent to endanger the life and property of plaintiff herein, neglected to inform the plaintiff that the mixture sold and represented as aforesaid was of a highly dangerous and explosive character, as the defendant well knew.

"(4) That on the 2d day of December, 1902, the plaintiff, relying upon said representations, * * * attempted to use the said mixture as and for kerosene, in a careful and usual manner, whereupon said mixture * * * exploded with great force and violence.

"(5) That the plaintiff was by said explosion greatly injured in body, and bruised and burned, and permanently injured and disabled from carrying on his * * * usual trade and vocation of painting, and the plaintiff suffered great physical and mental anguish, from which said injury he is informed and believes he will never recover, to his damage in the sum of \$13,000.

"(6) That by reason of said physical injury * * * the plaintiff has been caused great financial loss and damage, by reason of the loss of time and expenses for necessary medicine, and attendance of a physician, to his further damage in the sum of \$2,000."

The answer admits the allegations in paragraph 1, and denies all other allegations of the complaint, and alleges that if there was an explosion, and if the plaintiff was injured thereby, it was through his own carelessness and negligence.

The questions and answers which comprise the special verdict are as follows:

"(1) Was the plaintiff, James T. Morrison, injured by any explosion, and while pouring certain oil into a stove in which there was a fire, on December 2, 1902? Yes.

"(2) Did P. P. Lee [defendant] himself, or by or through his servants or agents or clerks, acting within the scope of their employment, sell oil to said Morrison, by which the explosion was caused? Yes.

"(3) Was the oil so sold, if sold at all, adulterated by being mixed with gasoline or paraffine, or other substance, so as to make the same unsafe for use? Yes.

"(4) If you find that the oil was sold by P. P. Lee or his agents, and was adulterated so as to make it dangerous to use, did defendant, P. P. Lee, or his agents or employes, know of such adulteration and mixture prior to the sale? Yes.

"(5) If the defendant, P. P. Lee, either in person or by or through his agents, did make such sale, but did not, either personally or by his agents, know of such adulteration, if any, or did not know the oil was dangerous to use, was he guilty of negligence; that is, was he negligent in the manner in which he handled his oils for sale to the public? Yes.

"(6) Did the plaintiff get some of the mixed or adulterated oil from the defendant, P. P. Lee, or his agents, if any such mixed or adulterated oil has been proven? Yes.

"(7) If the plaintiff did get some of the mixed or adulterated oil from the defendant—either from him personally or from his agents—was it that oil which he so got that exploded and caused the injuries to him, if any injuries have been shown? Yes.

"(8) Was the sale of the oil by the defendant or any of his agents or employes—if such sale has been shown—to the plaintiff, Morrison, the proximate cause of the injuries sustained by him, if any injuries have been shown? Yes.

"(9) Was Morrison, in the use of this oil, if any is shown, that he got there from the defendant or his agents, if he got any from him, guilty of such contributory negligence as would bar him from recovery under the law as laid down in the instructions? No.

"(10) Did plaintiff sustain any damage by injuries from the explosion on December 2, 1902? Yes.

"(11) If he did sustain damages, what was the amount of the same? \$4,750."

The trial court instructed the jury generally as to the law of the case, and particularly as to the law of negligence, contributory negligence, proximate, remote and intervening causes, and then submitted to them the questions above set out, with instructions as to

each question. Chief among the errors assigned upon the instructions—and it is the only one we need consider—is that given in submitting the ninth interrogatory: “The next interrogatory or finding is: ‘Was Morrison, in the use of this oil, if it is shown that he got any such oil from the defendant or any of his agents, guilty of such contributory negligence as would bar him from recovery under the law as laid down in the instructions?’ That is, if you find that Morrison, the plaintiff in this action, was guilty of such contributory negligence as, under the law, would bar him from recovery in this action, and guided by the instructions as given you, you will answer that, or make that finding, ‘Yes.’ If you find that he was not guilty of such contributory negligence as has been defined to you, you will make that answer, ‘No.’” Counsel for appellant contend that this instruction is erroneous, and that the form of the question contained in it is improper, for the reason that it informed the jury of the legal effect of their answer upon the plaintiff’s right of recovery, and authorized them to return a legal conclusion, thereby depriving the plaintiff of his statutory right to their findings upon facts only. In our opinion, the contention is sound and the error fatal. In giving this instruction, the trial court entirely ignored the important restriction which is placed upon the functions of the jury in reference to special verdicts. Section 5444, Rev. Codes 1899, reads as follows: “The verdict of a jury is either general or special: (1) A general verdict is that by which they pronounce generally upon all or any of the issues either in favor of the plaintiff or defendant; and (2) a special verdict is that by which the jury finds the facts alone, leaving the judgment to the court. The special verdict must present the conclusions of fact as established by the evidence and not the evidence to prove them; and these conclusions of fact must be so presented that nothing shall remain to the court but to draw from them conclusions of law.” The distinction in the duty of the jury in reference to the two kinds of verdicts is plainly declared. In returning a general verdict, the jury “pronounce generally upon all or any of the issues either in favor of the plaintiff or defendant,” while in a special verdict “the jury find the facts only,” leaving the ultimate decision upon those facts to the court. In the former case the jury apply the law to the facts; in the latter, they “find the facts only,” and the trial judge applies the law. It is at once apparent that general instructions as to the law of the case which would be proper in case of a general verdict should

not be given when a case is submitted for a special verdict. The object of the law is to secure fair and impartial answers to the questions submitted, "free from bias or prejudice in favor of either party or in favor of a particular result." The jury should not, therefore, be informed, either by the instructions or by the form of the questions, how any particular answer will affect the case, or what judgment will follow in consequence of it, "for to impart such information would almost necessarily defeat the object intended to be secured by a special verdict." And for this reason it is error to inform the jury under what circumstances the plaintiff can or cannot recover. "That this is the very thing which the special verdict is intended to prevent is evident from the law itself. The special verdict was expressly intended to submit to the jury for answer certain questions of fact, which they are to answer from the evidence, guided by instructions appropriate to the questions only, without regard to the legal effect of their answers upon the ultimate question of the rights of the parties. Thus it was expected and intended to relieve the jury from all consideration as to whether their answers are consistent with a general recovery by either party, and thus to obtain a result, as far as possible, free from sympathy or prejudice. * * * Properly used, it secures to parties a valuable right, and it should be carried out by the courts in such manner as to effectuate its purpose if possible." *Ward v. C., M. & St. P. Ry. Co. (Wis.)* 78 N. W. 442. The supreme court of Wisconsin, in passing upon this question under a statute like our own, has repeatedly held that a general instruction is not proper in connection with a special verdict, and that it is error to inform the jury as to the effect of their answers upon the ultimate rights of the parties. *Reed v. City of Madison*, 85 Wis. 667, 56 N. W. 182; *Coats v. Town of Stanton*, 90 Wis. 130, 62 N. W. 619; *Conway v. Mitchell*, 97 Wis. 290, 72 N. W. 752; *Kohler v. West Side Co.*, 99 Wis. 33, 74 N. W. 568; *Ward v. C., M. & St. P. Ry. Co. (Wis.)* 78 N. W. 442; *Baxter v. C. & N. W. Ry. Co. (Wis.)* 80 N. W. 644; *Sladky v. Marinette Lumber Co. (Wis.)* 83 N. W. 514; *Musbach v. Wisconsin Chair Co. (Wis.)* 84 N. W. 36; *Mauch v. City of Hartford (Wis.)* 87 N. W. 816; *Byington v. City of Merrill (Wis.)* 88 N. W. 26. See, also, *I., P. & C. Ry. Co. v. Bush*, 101 Ind. 582. In this case the error was flagrant, for the jury were not only informed by the instructions complained of as to the effect their answer would have upon the plaintiff's right to recover, but were

also expressly authorized to apply the law to the facts, and declare, as a conclusion, that the plaintiff was or was not barred from recovery "under the law as laid down in the instructions." This was the finding of a legal conclusion, which, under the plain language of the statute, belongs exclusively to the trial judge. It is entirely clear that as to the question of plaintiff's contributory negligence—and it was a material question—the finding has all the elements of a general verdict. Whether this finding would have been sufficient, had the jury found that the plaintiff was not guilty of contributory negligence, omitting the legal conclusion as to the effect of their answer, we do not determine. There is respectable authority for the view that such a finding is a mere statement of a conclusion, and will not support a judgment, save in exceptional cases, and that even then the jury must also find the physical facts upon which the conclusion is based. *P., C. & St. L. Ry. Co. v. Spencer*, 98 Ind. 186; *C., St. L. & P. Ry. Co. v. Burger*, 124 Ind. 275, 24 N. E. 981; *L., N. A. & C. Ry. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343; *Walkup v. May*, 9 Ind. App. 409, 36 N. E. 917; *E. & T. H. Ry. Co. v. Taft*, 2 Ind. App. 237, 28 N. E. 443; *C., C. & S. & L. Ry. Co. v. Hadley*, 12 Ind. App. 516, 40 N. E. 760; *Gaston v. Bailey*, 14 Ind. App. 581, 43 N. E. 254. See, also, *Lee v. C., St. P., M. & O. Ry. Co.*, 101 Wis. 352, 77 N. W. 714.

We express no opinion as to the form or sufficiency of the remaining questions, or as to whether they cover all the material issues. The error considered is fatal, and requires a reversal.

The case was tried and submitted to the jury upon the theory—and this was against the repeated objections of defendant's counsel—that the complaint alleges an injury resulting from the defendant's negligence. In view of the fact that a new trial must be had, it is proper to state that in our opinion this construction of the complaint is unwarranted. It plainly charges the defendant with an intentional injury, and not an injury resulting from negligence. The only attempt to charge negligence is the allegation that "defendant neglected to inform the plaintiff that the mixture was of a highly dangerous and explosive character." This is not an allegation of the negligent omission of a duty, for it is alleged in connection therewith that this omission was "with intent to endanger the life and property of the plaintiff." In other words, it alleges an intentional concealment of the dangerous character of the mixture, with intent to "endanger the life and property of the plaintiff."

It is improbable that the other questions presented will arise upon the new trial.

The district court is directed to set aside the judgment and grant a new trial. All concur.

(102 N. W. 223.)

THE NORTHWESTERN FIRE & MARINE INSURANCE COMPANY V.
SIDNEY C. LOUGH ET AL.

Opinion filed December 21, 1904.

Deed Is Absolute Unless Shown by Proof Clear, Satisfactory and Specific to Be a Mortgage.

1. A deed conveying a town lot to the defendant bank is alleged by the plaintiff to be a mortgage, but that claim is disputed, and is unsupported by evidence that is clear, satisfactory and specific. *Held*, that such deed is what it purports to be, viz., an absolute conveyance of fee title.

Deed by Cashier of Bank to Himself Presumptively Void.

2. A deed executed by the cashier of a state bank to himself as an individual is, in the absence of affirmative evidence of such authority, presumptively void and of no effect.

Appeal from District Court, Grand Forks county; *Fisk, J.*

Action by the Northwestern Fire & Marine Insurance Company against Sidney C. Lough and others. Judgment for defendant, and plaintiff appeals.

Affirmed.

J. A. Sorley and *Guy C. H. Corliss*, for appellant.

Lough as equitable owner, and Loe as receiver, as the holder of legal title should be compelled to respect plaintiff's mortgage, as its proceeds have enriched the fund in the hands of the receiver for the benefit of the creditor.

Chas. F. Templeton, for respondent.

A warranty deed properly executed expresses upon its face its true meaning, intent and purpose. This presumption is overcome only by evidence that is "clear, specific, satisfactory and of such a character as to leave in the mind of the chancellor no hesitation or substantial doubt." *McGuin v. Lee*, 10 N. D. 160, 86 N. W. 714;

Little v. Braun, 11 N. D. 410, 92 N. W. 800; Riley v. Riley, 9 N. D. 580, 84 N. W. 347.

A deed by a cashier of a bank to himself is void, and conveys no interest. Haywood v. Lincoln Lumber Co., 26 N. W. 184; Park Hotel Co. v. Fourth National Bank, 86 Fed. 742; 30 C. C. A. 409; Security National Bank v. Kingsland, 5 N. D. 263, 65 N. W. 697; Perry on Trusts, section 207; Alta Silver Mining Co. v. Alta Placer Mining Co., 21 Pac. 373; Germania Safety Vault & Trust Co. v. Boynton, 71 Fed. 797; Clendenning v. Hawk, 10 N. D. 90, 86 N. W. 114; Thompson on Corporations, Vol. 3, section 4070.

Separate acts of individual directors are of no force to bind a bank, its stockholders or creditors. Baldwin v. Canfield, 26 Minn. 43; First National Bank v. Drake, 11 Pac. 445; Gashwiller v. Willis, 33 Cal. 11, 91 Am. Dec. 607.

GLASPELL, Special Judge. The plaintiff brings this action against Sidney C. Lough et al. to foreclose a mortgage against lot 17 in block 7 in the town of Northwood and county of Grand Forks, which mortgage was executed as security for a note for \$2,000. The defendants, State Bank of Northwood and Samuel Loe, as receiver of said bank, answer, and assert that Lough had no right or title to the property mortgaged at any time, but, on the contrary, the lot was at the time of the execution of the mortgage and note the property of the bank, under a warranty deed duly recorded. The defendant bank and its receiver ask that title be quieted in them.

It appears that a warranty deed was executed by one Iver Johnson to the State Bank of Northwood on the 17th day of February, 1897, and recorded two days later. The plaintiff claims that this instrument, in form a deed, was in truth a mortgage, and that the debt secured thereby has been paid. Whether this conveyance was a deed or a mortgage is the principal issue in this action. The plaintiff's mortgage was executed and delivered on the 14th day of December, 1899, and recorded on the 26th day of the same month. The source of title for all parties to this action was Iver Johnson, and the defendant bank rests upon his warranty deed, which purports to convey an absolute title for a consideration. As this deed was executed, delivered and recorded prior to the mortgage, it conveyed a good title, unless the writing was not a deed, but really a mortgage. The burden of showing the negative was upon the plaintiff, and required evidence clear, satisfactory and specific. Jasper v. Hazen, 4 N. D. 1, 58 N. W. 454, 23 L. R. A. 58; Riley v. Riley, 9 N. D.

580, 84 N. W. 347; McGuin v. Lee, 10 N. D. 160, 86 N. W. 714; Wells v. Geyer, 12 N. D. 316, 96 N. W. 289; Little v. Braun, 11 N. D. 410, 92 N. W. 800. The trial court found, under the evidence, that the deed was an absolute conveyance of title; and this court reaches the same conclusion upon a review of the entire case, under section 5630, Rev. Codes 1899.

The defendant Sidney C. Lough is the central figure in this case, and he was at the times herein stated cashier of the State Bank of Northwood. The bank became insolvent, and Samuel Loe was appointed receiver October 10, 1901, under the state banking law. An instrument purporting to be a warranty deed from the State Bank of Northwood to Sidney C. Lough was recorded October 31, 1899, conveying the premises in issue. It was executed by Lough, as cashier of the bank, to himself as grantee. There is no evidence to show that he had power or authority from the directors of the bank to make such deed, but it was affirmatively shown that he had no such power. In the absence of affirmative evidence of such authority, a deed made by the cashier of a bank to himself as an individual is presumptively void and of no effect. *West St. Louis Savings Bank v. Parmalee*, 95 U. S. 557, 24 L. Ed. 490. To the general rule that the acts and contracts of a general agent, within the scope of his powers, are presumed to be lawfully done and made, there is an exception as universal and inflexible as the rule. It is that an act done or a contract made with himself by an agent on behalf of his principal is presumed to be, and is, notice of the fact that it is without the scope of his general power, and no one who has notice of its character may safely rely upon it without proof that the agent was expressly and specifically authorized by his principal to do the act or make the contract. *Park Hotel Co. v. Fourth National Bank of St. Louis*, 86 Fed. 742, 30 C. C. A. 409; *Bank v. Kingsland*, 5 N. D. 263, 65 N. W. 697. There has been no ratification of the act of Lough in conveying the lot to himself, but on the contrary, he admitted to the state bank examiner, after the failure of the bank, that the property belonged to the bank.

The trial court ruled that the State Bank of Northwood was, and has at all times since the 17th day of February, 1897, been the owner in fee of the land in controversy; that the deed of the State Bank of Northwood executed by Sidney C. Lough, its cashier, as Sidney C. Lough, is void and of no effect; and that the mortgage executed by Lough in favor of plaintiff is wholly void and of no

effect, and should be cancelled of record. The evidence conclusively supports this conclusion.

The judgment is affirmed.

YOUNG, C. J., and MORGAN, J., concur. COCHRANE, J., having been of counsel in the court below, took no part in deciding the case: S. L. GLASPELL, judge of the Fifth Judicial District, sitting in his stead.

(102 N. W. 160.)

JOSEPH F. WALDNER V. BOWDEN STATE BANK.

Opinion filed December 27, 1904.

Upon Objection to the Sufficiency of the Complaint After Witness Is Sworn, It Will Be Liberally Construed.

1. Under an objection to a complaint as not stating a cause of action, made for the first time at the trial after a witness is sworn, the complaint will be liberally construed, and all reasonable inferences from the facts stated will be indulged in to sustain the pleading.

Under Such Construction Complaint Sufficient — Usury.

2. Under such rule of construction, the complaint states a cause of action for the recovery of money paid as usury pursuant to a contract, in an action under section 4066, Rev. Codes 1899, although it does not expressly allege that such payments were knowingly made and received.

Evidence — Harmless Error.

3. The admission of irrelevant testimony is not prejudicial error in cases where the party objecting to such evidence offers no proofs, and there is no conflict in the evidence received, and the evidence sustains the verdict without the irrelevant testimony.

Usury — Recovery of Double the Interest Payments.

4. Under section 4066, Rev. Codes 1899, prescribing the amount recoverable when usurious payments have been made, plaintiff may recover double the amount of all interest payments made, and not merely the excess over the lawful rate.

Appeal from District Court, Wells county; *Glaspell, J.*

Action by Joseph F. Waldner against the Bowden State Bank. Judgment for plaintiff. Defendant appeals.

Affirmed.

Lee Combs, for appellant.

Under section 4066, Rev. Codes 1899, the plaintiff must allege that the usurious interest was knowingly taken. The statute is penal, and the illegal contract must be precisely set forth. *Blaine v. Curtis*, 59 Vt. 120, 59 Am. Rep. 702; *Livermore v. Boswell*, 4 Mass. 437; *Morrill v. Fuller*, 7 Johns. 402; *Schuyler Nat'l Bank v. Bollung*, 40 N. W. 411; *Henderson National Bank v. Aleves*, 15 S. W. 132.

Failure to demur to a complaint does not waive the right to urge its insufficiency thereafter. *James River Nat'l Bank v. Purchase et al.*, 9 N. D. 280, 83 N. W. 7.

It was error to allow the witness Nichols to testify that the bank charged a usurious rate of interest on all of its loans. In civil actions evidence of transactions similar to that under investigation is not admissible where there is no charge of fraud. *Tallman v. Kimball*, 74 Hun, 279, 26 N. Y. S. 810; *Hoxie v. Home Insurance Co.*, 32 Conn. 21; *Elliott v. Lyman*, 85 Mass. 110; *Lynn v. Gilman*, 46 Mich. 628, 10 N. W. 46; *Central Ry. Co. v. Brunson*, 63 Ga. 504; *True v. Sanborn*, 27 N. H. 383; *Ross v. Ackerman*, 46 N. Y. 210; *McGuire v. Kenefich*, 82 N. W. 485; *Ottillie v. Waechter et al.*, 33 Wis. 252; *Russell v. Hearne*, 18 S. E. 711; *Hartman v. Evans*, 18 S. E. 810.

The intent to take usurious interest must have been in full contemplation of both parties to the transaction. *Tyler on Usury*, 103.

To work a forfeiture, under the statute, there must have been an agreement for usury. *Hawk v. Syndaker*, 86 Ill. 197; *Sexton v. Murdock*, 36 Ia. 516; *Dodds et al. v. McCormick Harvesting Mach. Co.*, 87 N. W. 911.

The court erred in instructing the jury that plaintiff was entitled to recover twice the amount of interest and twice the excessive usurious interest received by the defendant. The verdict could only be for double the excess of interest and not for double the entire interest reserved or paid. Such is the construction of section 5198, Revised Statutes of the United States, identical with section 4066, Rev. Codes of North Dakota. *Bobo v. Peoples Nat'l Bank of Shelbyville*, 21 S. W. 889; *Garza v. Sullivan et al.*, 10 Tex. Civ. App. 184, 30 S. W. 240; *Hintermeister v. Bank*, 64 N. Y. 212; *Knapp v. Briggs*, 84 Mass. 551; *Brown v. Bank*, 72 Pa. St. 209; *Hardin v. Trimmier*, 30 S. C. 391, 8 S. E. 342.

J. A. Callahan, for respondent.

Great latitude is indulged to sustain a complaint assailed for the first time at the trial by an objection to the introduction of evidence on the ground that the complaint fails to state facts sufficient to constitute a cause of action. *Heedleson et al. v. First Nat'l Bank of Tobias*, 76 N. W. 570; *Stutsman County v. Mansfield et al.*, 5 Dak. 78, 37 N. W. 304; *Whitbeck v. Sees*, 10 S. D. 417, 73 N. W. 915.

Where a complaint fails to state facts essential to a cause of action, which might be supplied by an amendment before or after judgment, and these facts are proved at the trial after the judge has refused to exclude the evidence of the plaintiff on the ground that the complaint does not state facts sufficient to constitute a cause of action, the defect in the complaint is no ground for a reversal of judgment rendered in favor of the plaintiff. *Johnson v. Burnside*, 3 S. D. 230, 52 N. W. 1057; *Lexington Bank v. Marsh*, 95 N. W. 341; *Strait v. City of Eureka*, 96 N. W. 695.

An objection that a complaint does not state facts sufficient to constitute a cause of action made for the first time on trial, is unfavorable if the complaint contains a fair inference of the facts. *Commonwealth Title Insurance & Trust Co. v. Dokko*, 74 N. W. 891; *Peterson v. Hopewell*, 76 N. W. 451; *Roberts v. Taylor*, 27 N. W. 87; *Marvin v. Weider*, 48 N. W. 825.

The admission of testimony that the bank usually took usurious interest was without prejudice, as it appeared that usurious interest was charged in the particular transaction in controversy; that such interest was usually charged could not have influenced the jury. *Sloan v. Citizens Nat'l Bank*, 95 N. W. 480; *Becker v. Vollmer*, 95 N. W. 482.

Where a tender of money authorizes an agent to manage and control his lending business, he is presumed to know the manner in which the business will be conducted, and is chargeable with the acts of such agent, legal or illegal, which are within the scope of his authority; and charging usurious interest is within the scope of the authority of a cashier of a bank. *Webb on Usury*, 100, 101; *Anderson v. Vallery*, 58 N. W. 191; *Cheney v. Eberhardt*, 1 N. W. 197; *Lewis v. Willoughby*, 43 Minn. 307.

In actions brought to recover twice the usurious interest paid, the plaintiff may recover double the amount of interest actually paid, and is not confined to double the usury paid. *Webb on Usury*, 604; *Schuyler Nat'l Bank v. Bollong*, 45 N. W. 164, 56 N. W. 209; *National Bank v. Davis*, 8 Bliss 100; 1 *National Bank Cas.*

350; *National Bank v. Trimble*, 40 Ohio St. 209; *Calgin v. City National Bank*, 40 S. W. 634; *Second National Bank v. Morgen*, 16 Pa. St. 199, 30 Atl. 957; *Osborn v. First Nat'l Bank*, 34 Atl. 858; *Bank v. Trumble*, 40 Ohio St. 629; *Bank v. Karmany*, 98 Pa. St. 65; *Bank v. Alves*, 15 S. W. 132; *Wiley v. Starbuck*, 44 Ind. 298.

MORGAN, C. J. Action to recover a judgment for money paid to the defendant by plaintiff on a usurious contract. The complaint alleges that the defendant loaned plaintiff \$265, and that he gave it his note for \$315, bearing interest at ten per cent. per annum, and that it was agreed between them that plaintiff should pay twelve per cent. per annum as interest on said sum of \$315.70 on April 9, 1903, about thirteen months after the note was given. Plaintiff seeks to recover twice the amount of interest paid on the note, together with twice the \$50 paid as bonus. Plaintiff asks judgment for \$182.40—twice the amount paid as interest and bonus. The answer is a general denial. The jury found for the plaintiff for the full amount claimed. Defendant appeals from the judgment, and assigns as errors: (1) The admission of any evidence under the allegations of the complaint, for the reason that it fails to state that the usurious payment was knowingly made and received; (2) receiving evidence of other and independent usurious transactions between the defendant and other persons; (3) failure to charge the jury that the payment of the usury must have been knowingly made and received; (4) failure to charge the jury that plaintiff could recover only the excess of interest paid over and above the rate allowed by law.

The complaint does not allege expressly that usury was knowingly paid and accepted. It does state that the plaintiff and defendant entered into a contract under which the plaintiff received \$265 as a loan from defendant, and that it was agreed between the parties that plaintiff was to pay \$50 as a bonus thereon, in addition to twelve per cent. per annum on \$315, the amount contracted to be paid according to the face of the note set forth in the complaint. The sufficiency of the complaint was not attacked by demurrer, but by an objection to the introduction of any evidence under it, made after the first witness was sworn. As against such objection, we have no doubt that it was properly overruled. As against an objection thus made, the complaint must be liberally construed, and it is only where there is a total want of sufficient alle-

gations that it should be sustained. If a necessary fact is alleged by fair inference or intendment, the objection will be overruled. The allegation that the usurious payment was made pursuant to a contract that it should be paid is sufficient as against an objection so made. All the authorities favor liberal construction of a pleading when attacked by such motions. *Stutsman Co. v. Mansfield*, 5 Dak. 78, 37 N. W. 304; *Commonwealth Title Insurance Co. v. Dokko*, 71 Minn. 533, 74 N. W. 891; *Peterson v. Hopewell*, 55 Neb. 670, 76 N. W. 451; *Whitbeck v. Sees*, 10 S. D. 417, 73 N. W. 915. The complaint, liberally construed, shows that both parties intended to contract for payment of usurious interest, and that it was paid and received knowingly and pursuant to such contract.

Evidence was admitted over objection that the defendant was accustomed to take usury, on all loans made by it, and evidence was received to the effect that usury was accepted by defendant on loans other than the one in suit. In case defendant had offered testimony tending to deny the plaintiff's evidence that the loan in suit was usurious, its admission might have been prejudicial error, but such a case is not before us for consideration. In this case the defendant offered no evidence at all. As we look at the evidence, it would have warranted a direction of a verdict for the plaintiff by the court. Under such circumstances, if error at all, it was error without prejudice to admit this evidence. *Donley v. Camp*, 58 Am. Dec. 274; *Sloan v. Citizens' National Bank (Neb.)* 95 N. W. 480.

The court did not in express words instruct the jury that the usurious payments must have been knowingly made and received before the plaintiff could recover. No such instruction was requested, which is a sufficient reason for denying defendant's assignment on that ground in this court. The charge, however, in effect, informed the jury that the receiving and giving of usury must be knowingly done, before plaintiff could recover. It stated that the giving and taking of usury must be pursuant to a contract that usury payments were intended. Section 4066, Rev. Codes 1899, prescribing under what circumstances and conditions payments of usury can be recovered back by action, was read to the jury. This was amply sufficient, in the absence of a request for a more specific instruction.

Error is also assigned on the charge of the court in respect to the amount recoverable when usurious payments have been accepted. The rule was given to the jury that twice all sums paid as interest

were recoverable, if the transaction was tainted with usury. Defendant claims that twice the interest paid over and above the rate allowed by law can only be recovered back. A determination of this question requires a construction of our Code bearing upon the rate of interest allowed, and the recovery of sums paid as interest, when exceeding the sum allowed by law. Section 4064, Rev. Codes 1899, reads as follows: "No person, firm, company or corporation shall directly or indirectly take, or receive, or agree to take or receive in money, goods or things in action or in any other way any greater sum or any greater value for the loan or forbearance of money, goods or things in action than twelve per cent per annum; and in the computation of interest the same shall not be compounded. Any violation of this section shall be deemed usury; provided, that any contract to pay interest not usurious on interest overdue shall not be deemed usury." Section 4066, Rev. Codes 1899, reads: "The taking, receiving, reserving or charging a rate of interest greater than is allowed by section 4064, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in an action for that purpose twice the amount of interest thus paid from the person taking or receiving the same; provided, that such action is commenced within two years from the time the usurious transaction occurred." The latter section provides for a penalty for usurious transactions under two independent conditions: (1) When usury rests in contract, and has only been charged; (2) when it has been paid. In cases where usury has been charged and not paid, and the usurer brings an action upon his contract, the illegality of the contract may be alleged as a defense, and if proven, the entire interest due upon the contract becomes forfeited, and no recovery can be had upon the contract, except as to the principal sum loaned. In cases where the usury has been paid, and it is sought to recover back the sum paid as interest, a more difficult question is presented, as the meaning of the statute is not clear. By construing section 4066 in its entirety, we think the legislative intention was that all sums paid as interest, whether within or beyond the provisions of the statute, are recoverable in double the sums paid. It does not seem reasonable that the intention of the legislature was that all interest was forfeited when it rests

in contract, merely, and that the illegal part only is forfeited if the debtor has paid the whole sum contracted to be paid as interest. The words "the amount of interest thus paid" refer to the "greater rate," which includes a legal and an illegal rate, and they include the same sums as are included in the words "the entire interest," in the first part of the section. When recovery is allowed for the sum paid as a "greater rate," it includes a recovery for the whole sum paid, whether legal or illegal, and is the same as the entire interest contracted to be paid. Such is the construction generally given to statutory provisions identical or similar to section 4066 in other states, and this seems to us correct, although some cases hold to the contrary. The following cases sustain the construction which we have given to the statute: *Lebanon National Bank v. Karmany*, 98 Pa. 65; *National Bank v. Trimble*, 40 Ohio St. 629; *Smith v. First National Bank (Neb.)* 60 N. W. 866; *Bank v. McInturff*, 3 Kan. App. 536, 43 Pac. 839; *National Bank v. Bollong*, 28 Neb. 684, 45 N. W. 164; *Colgin v. Bank (Tex. Civ. App.)* 40 S. W. 634; *Watt v. First National Bank (Minn.)* 79 N. W. 509; *Henderson National Bank v. Alves*, 91 Ky. 143, 15 S. W. 132; *Louisville Trust Co. v. Kentucky National Bank (C. C.)* 87 Fed. 143, and (C. C.) 102 Fed. 442; *Hill v. National Bank (C. C.)* 15 Fed. 432.

Other assignments made have been duly considered, and found to be without merit.

The judgment is affirmed. All concur.

(102 N. W. 169.)

ROBERT A. FOX v. A. E. WALLEY, HERBRAND LEE, OSCAR WAGAR, JAMES LOCKHEAD AND GEORGE FREEMAN, COMPRISING THE BOARD OF COUNTY COMMISSIONERS OF McHENRY COUNTY, NORTH DAKOTA; A. H. JONES, THE COUNTY OF McHENRY IN THE STATE OF NORTH DAKOTA, A CORPORATION; THE FIRST NATIONAL BANK OF MINOT, NORTH DAKOTA, A CORPORATION; E. D. KELLEY, JOHN A. ELY, WILLIAM HOPE, J. H. SCOFIELD, JOHN MCJANNETT, JOHN LYNCH, ALLEN THOMPSON, E. H. SYKES, JOHN EHR, WILLIAM E. MANSFIELD, C. H. PARKER, A. P. SCOFIELD, OLAF A. OLSON, JAMES JOHNSON, H. F. VANWAGGENER AND S. L. PAGE, DEFENDANTS, AND A. H. JONES, APPELLANT.

Opinion filed January 3, 1905.

Resident Freeholder and Taxpayer May Restrain County Commissioners from Making Unlawful Expenditures.

1. The plaintiff who is a resident freeholder and taxpayer of McHenry county, N. D., is a proper party to bring and maintain this

action to restrain the board of county commissioners and one A. H. Jones, a nonresident, from proceeding further in the performance of a contract whereby the said board employed said Jones to collect a final judgment in favor of said county.

Where Contract is Ultra Vires, Laches in Bringing Action no Defense.

2. Whether the plaintiff was or was not guilty of negligence and unnecessary delay in instituting this action, he may nevertheless maintain the same, because the contract made by and between the board of county commissioners and the defendant Jones was ultra vires and void.

Powers of County Commissioners.

3. A contract made by the board of county commissioners of McHenry county with A. H. Jones, whereby he was employed to collect a judgment for \$6,565, belonging to said county, from which no appeal had been taken, and the time for an appeal had expired, which contract contemplated the bringing of supplementary proceedings and divers actions against the judgment debtors and others, is not within the powers of such board, but, on the contrary, is exclusively within the control and jurisdiction of the district court.

Appeal from District Court, McHenry county, *Palda, Jr., J.*

Action by Robert A. Fox against A. H. Jones and others. Judgment for plaintiff. Defendant Jones appeals.

Affirmed.

G. A. Bangs and *Guy C. H. Corliss*, for appellant.

A county like an individual may compromise a claim, and can sell a doubtful claim or judgment at a discount, and contract with a third party to endeavor to collect it and bind him to pay the county a fixed sum from amounts first realized. *State v. Davis*, 75 N. W. 897; *Collins v. Welch*, 12 N. W. 121, 43 Am. Rep. 111; *Agnew v. Brall*, 16 N. E. 230; *Town of Petersburg v. Mappin*, 14 Ill. 193, 56 Am. Dec. 501; *Supervisors v. Birdsall*, 4 Wend. 454; *Ry. Co. v. Anthony*, 73 Mo. 431; *Board v. Bowen*, 4 Lansing 31; *Washburn County v. Thompson*, 75 N. W. 309; *Beach Pub. Corp.*, sections 638, 639, 640 and 641; 1 Dill. Mun. Corp., section 477; *Grimes v. Hamilton County*, 37 Ia. 290; *Prout v. Pittsburg Fire Dist.*, 28 N. E. 679; *State v. Martin*, 43 N. W. 244.

County commissioners, acting in good faith, may adjust a controversy. *Town of Petersburg v. Mappin*, 14 Ill. 193, 56 Am. Dec. 501.

Plaintiff is estopped from maintaining his action. He remained silent until defendant Jones had expended large sums and incurred

liabilities in good faith under the agreement and paved the way for collecting the judgment, then instituted this suit. *Harkness v. Med. River*, 6 Ohio St. 137; *Collins v. City*, 12 Green. 293; *Chamberlain v. Town*, 14 Atl. 865; *City v. Alexandria*, 12 Pet. 93; *Ellis v. Karl*, 7 Neb. 381; *Bigelow v. Los Angeles*, 24 Pac. 778; *Osborn v. Ry. Co.*, 37 Fed. 830, 98 Ill. 415; *Atty. General v. Ry. Co.*, 9 Green. 49.

P. J. McClory and McClory, Barnett & Adamson, for respondent.

There is a difference between suits pending and those that have resulted in a judgment for the county, and in which litigation is ended. And where the judgment debtor is solvent they cannot compromise. *State v. Davis*, 75 N. W. 897; *Town of Butternut v. O'Malley et al.*, 7 N. W. 246.

The doctrine that the governing body of a corporation cannot discharge a debt without its payment, does not apply to debts of doubtful validity before final judgment, or against insolvent parties after judgment. *Washburn County v. Thompson*, 75 N. W. 309.

In the case at bar the judgment was final, and there was no showing of debtors' insolvency and they were presumed to be solvent. The power to dispose of the property of a county as was done in this case is a doubtful one; in such case the doubt is resolved against the corporations and the power denied. 1 Dill. Mun. Corp. 55; *Hanger v. City of Des Moines*, 2 N. W. 1105; *Minturn v. La Rue*, 23 Howard, 435; 16 L. Ed. 574; *Van Antwerp v. Dell Rapids. Twp.*, 53 N. W. 82; 7 Am. & Eng. Enc. Law (2d Ed.) 926.

Contracts of such corporations in excess of expressed and implied powers are void. *Story v. Murphy*, 9 N. D. 115, 81 N. W. 23; *Platte County v. Gerrard*, 11 N. W. 298.

Powers conferred upon a municipal corporation involving exercise of judgment and discretion cannot be delegated. It cannot contract for the collection of debts, bringing of suits, leaving such matters to the judgment of others. *Scollay v. County of Butte*, 7 Pac. 661; *Cooley on Const. Lim.* 504; 27 Am. & Eng. Enc. Law, 143 (1st Ed.)

GLASPELL, District Judge. This cause was tried in the court below upon stipulated facts, which may be summarized as follows: The plaintiff is a resident freeholder and taxpayer of McHenry county, and, as such, brings this suit to restrain further proceedings under

a contract made by the county commissioners of said county with defendant A. H. Jones, whereby he is authorized to collect a certain judgment for \$6,565, with interest from January 3, 1899, in favor of said county, and against the First National Bank of Minot and sixteen others, as sureties upon a bond given to enable the bank to be a county depository. These judgment debtors and the county commissioners and A. H. Jones are made defendants in this action. The judgment mentioned was dated January 3, 1899, and was docketed March 6, 1899. On the 8th day of January, 1901, after time for appeal had expired and the judgment had become final, the county commissioners, in response to an offer made by Jones, gave him authority, by resolution and by written power of attorney, to collect said judgment, upon condition that he should turn over to the county the first \$1,000 collected, and save the county harmless from all costs and expenses of every kind and nature. All moneys collected, over \$1,000, should be compensation for Jones. A power of attorney was also given Jones by authority of said resolution, and which provided, among its terms, that he was "appointed * * * a true and lawful attorney * * * to collect, settle and compromise and satisfy of record, partially or in whole, a certain judgment" (the one mentioned). He was further granted "full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in the premises." Prior to the rendition of the judgment mentioned, some of the defendants therein had transferred some of their property to divers and sundry persons. No execution was issued upon the judgment, or any attempt made for its collection by McHenry county or any of its officers, except as Jones made such attempt on and after January 9, 1901, by issuing execution, and by bringing suits against several defendants and others, to secure its collection, in the name of McHenry county. Jones has expended the sum of \$500 for counsel fees and other expenses. At all times herein mentioned, McHenry county had a duly elected, qualified, and acting state's attorney. No order has been made by the district court appointing Jones as attorney for the county, and his sole authority was the resolution and power of attorney of the board of county commissioners. This action was begun on or about March 11, 1901, and a temporary injunction issued, restraining the defendants from proceeding further under the Jones contract, and which order was made perpetual in the decree rendered November 10, 1903.

Upon the facts thus stipulated and found by the trial court, the appellant contends, first, that the plaintiff is estopped from maintaining this action because of full knowledge that the contract had been made, and that Jones was proceeding in good faith to carry out his part of it. "Plaintiff remained silent until Jones had expended a large amount of money and incurred large liability in his efforts, in good faith, to carry out the agreement, and had also paved the way by legal proceedings to bring about the collection of at least a portion of the judgment, and then, after this delay, instituted this suit." Inasmuch as the plaintiff on March 11, 1901, brought this suit, and only two months and three days later than the contract with Jones, and the evidence failing to show any notice or knowledge on the part of Mr. Fox, prior to bringing this suit, of the transaction with Jones, it does not seem reasonable to assume that he has waived his right as a citizen to bring this action. If the agreement with Jones was illegal and void, as we shall hold, then it cannot be ratified by any taxpayer nor by the county commissioners. Ratification presupposes the power in the board to make the original contract, and, that body having no such power, there is no question here of ratification. *Capital Bank of St. Paul v. School District No. 53*, 1 N. D. 479, 48 N. W. 363; *State v. Getchell*, 3 N. D. 243, 55 N. W. 585; *Engstad v. Dinnie*, 8 N. D. 1, 76 N. W. 292; *Storey v. Murphy*, 9 N. D. 115, 81 N. W. 23; *Roberts v. City of Fargo*, 10 N. D. 230, 86 N. W. 726.

The gist of this appeal is the question of the power of the county board to employ Jones to collect a judgment belonging to the county. The board possessed the powers conferred by statute, and no more. Rev. Codes 1899, sections 1905, 1906, 1907, grant the following powers, among others, to boards of county commissioners: "It shall have power to institute and prosecute civil actions in the name of the county for and on behalf of the county. It shall also have power to make all orders respecting property of the county," etc. "It shall superintend the fiscal affairs of the county and secure their management in the best manner." Section 1979, Rev. Codes 1899, provides, among other matters, that the state's attorney shall defend all suits brought against his county, and prosecute all actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or his county. From these statutes, and from the nature of the labor to be performed, the inference is plain that it is one of the duties of the state's attorney to collect a judgment rendered in favor of his county, if such end

may be accomplished. This service was work for a lawyer, and McHenry county had such officer, whose compensation was already provided in his salary.

Counsel for Jones cites a number of cases in support of the contract of employment—among them the following: *State v. Davis*, (S. D.) 75 N. W. 897, 74 Am. St. Rep. 780, which holds that a suit pending may be settled pending appeal by a board of county commissioners by a compromise upon a disputed claim; and this is qualified by the words of the opinion, which states: "Of course, where the debtor is solvent, the board cannot, without fraud, thus discharge an obligation concerning the validity of which there is no question; but where, as in this case, the claim is in doubtful litigation, and a compromise made by the board is fully sustained by the court before whom all proceedings were had, we would most reluctantly disturb such action on appeal." In *Collins v. Welch*, 58 Iowa, 72, 12 N. W. 121, 43 Am. Rep. 111, the power was conceded to the board to compromise and settle a judgment, but because the debtor was insolvent. Other cases cited are on the same line, except that the claim or demand was disputed and of doubtful character. In each the settlement was made between the original parties, and not, as claimed here, with an outsider. The power conceded in these cases was one of judgment and discretion, and properly allowed to boards having charge of the fiscal affairs of municipal corporations. The present question is not a matter of compromise or settlement with the judgment debtors. Neither is it shown that the judgment debtors are insolvent. It has not been made to appear that the judgment is uncollectible, or that any reason exists to replace the state's attorney with another person, whose profession or business is undisclosed by the record, and whose charges for services are so extravagant as to seem to be opposed to public policy.

Under the statute laws of this state, there is a remedy for such a situation as exists when a state's attorney neglects his duties, or when the matter is one of importance. Section 1988 of the Revised Codes of 1899 provides as follows: "The judge of the district court may in his discretion appoint special counsel to assist the state's attorney in important cases." Under the facts stated in the findings, and reasserted in appellant's brief, viz., that several actions were necessary to enforce and collect the judgment in issue, it seems that an appointment by the district judge under this statute could be properly made. It was therefore unnecessary for the com-

missioners to strain their powers to secure counsel to undertake the collection of the judgment. It seems that the power to secure additional legal services in important cases rests with the district court, and not with the county commissioners. Such was the ruling of the court in *Storey v. Murphy*, 9 N. D. 115, 81 N. W. 23. wherein it is held that the employment by the board of county commissioners of special counsel to assist the state's attorney in the enforcement and collection of a large amount of disputed taxes, and in defense of certain suits brought by the Northern Pacific Railway Company in the same controversy, was a contract ultra vires and void. This court held that under such circumstances the district judge, under section 1988, supra, was vested with a discretion which was exclusive as to the appointment of special counsel to assist the state's attorney. The defendant Jones alleges in his answer, and repeats in his brief, that his contract contemplates that he should bring supplementary proceedings, and bring suits for and in behalf of the county to reach property concealed by some of the judgment debtors. His admissions establish that the district judge possessed the exclusive power to appoint him for such service, and it is not contended that any such appointment was made. The transaction here was not in any sense or degree a sale of property. It was not a settlement or compromise, and was not made with the judgment debtors. It was nothing more than the employment of a person to collect a final judgment for money, and the work to be done was part of the duties of the state's attorney, or such attorney as the district judge might appoint.

The judgment of the lower court is affirmed.

MORGAN, C. J., and YOUNG, J., concur. COCHRANE, J., having been of counsel, by request S. L. GLASPELL, Judge of the Fifth Judicial District, sat in his stead.

(102 N. W. 161.)

GEORGE O. HAUGEN V. OLE C. SKJERVHEIM.

Opinion filed January 5, 1905.

Vendor and Purchaser — Annulment of Contract.

1. A written contract for the sale of real estate may be annulled by parol, or abandoned by the parties thereto.

Estoppel.

2. An equitable estoppel by deed or in pais is not created or enforceable unless there has been a change in the situation of one of the parties in reliance on the deed or statements, followed by damage.

Evidence.

3. To create an estoppel, the evidence must be clear, and not a matter of inference.

Abandonment.

4. Evidence reviewed, and *held* to show an abandonment of a written contract for the sale of real estate, and not to show an estoppel.

Appeal from District Court, Grand Forks county; *Fisk*, J.

Action by George O. Haugen against Ole C. Skjervheim. Judgment for defendant, and plaintiff appeals.

Affirmed.

Bosard & Bosard, for appellant.

A collateral covenant restraining the assigning of an agreement will not be enforced in equity where it appears in the contract that such restraint is but an incident to the objects of the principal covenants which have been substantially performed. *Griggs v. Landis*, 21 N. J. Eq. 494; *Pomeroy on Contracts*, (2d Ed.) chapter 1; *Pomeroy on Specific Performance of Contracts*, (2d Ed.) section 314; *Ross v. Page*, 11 N. D. 458, 92 N. W. 822.

Plaintiff furnished part of the seed for the land in the year 1903 and defendant did not refuse to deed this land until the fall of 1903. He was estopped both by deed and by matter in pais to set up or prove that the contract for sale had been by defendant and Hegre abandoned and not acted on. *American G. & V. M. Co. v. Wood*, 90 Me. 516, 43 L. R. A. 449; *Caswell v. Fuller*, 87 Me. 105; *Stanwood v. McLellan*, 48 Me. 275; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, 86 Am. Dec. 362; *Marston v. Kennebec M. L. Ins. Co.*, 89 Me. 266, 56 Am. St. Rep. 412.

Where the true owner holds out another, or allows him to appear as the owner as having full power of disposition over the property, and innocent third parties are thus let into dealing with such apparent owner, they will be protected. *McNeil v. Tenth National Bank*, 46 N. Y. 325; *Gregg v. Wells*, 10 Ad. E. El. 90; *Saltus v. Everett*, 20 Wend. 268; *Mowrey v. Walsh*, 8 Cow. 238; *Root v. French*, 13 Wend. 570; *Smith v. Clews*, 105 N. Y. 283, 11 N. E. 632; *Weaver*

v. Barden, 49 N. Y. 286; Paddon v. Taylor, 44 N. Y. 371; Lindsay v. Cooper, 14 Ala. 170, 16 L. R. A. 813, 33 Am. St. Rep. 105.

Skulason & Skulason, for respondent.

If a contract by its terms is not transferable, it cannot be transferred, as this would be annulling an agreement which the parties had made. 2 Am. & Eng. Enc. Law 1035; *La Rue v. Groezinger*, 84 Cal. 281, 24 Pac. 42, 18 Am. St. Rep. 179.

The common-law rule as to the assignability of choses in action has been changed by statute. Section 1459, section 1044, section 1458, Rev. Codes 1899..

A contract may be assigned by the person to whom the money is payable if nothing in the contract which manifests the intention of the parties that it shall not be assigned. *Board of Commissioners v. Diebold Safe & Lock Co.*, 133 U. S. 473, 10 Sup. Ct. Rep. 399; *Jackson v. Sessions*, 67 N. W. 315; *Andrew v. Meyerdirck*, 40 Atl. 173; *City of Omaha v. Standard*, 75 N. W. 859.

Courts uniformly hold that the evidence to establish estoppel by conduct or misrepresentation must be clear, precise and unequivocal. 11 Am. & Eng. Enc. Law, 424, and cases cited. Estoppel in pais has no application to interest in land. *Showers v. Robinson*, 5 N. W. 988.

A court of equity will not decree a specific performance of contract where the relief sought is not established by clear and convincing proof; nor unless the complainant can show that he has performed it in all its parts, or show just excuse for nonperformance, and the burden of proof is on the complainant to show his right to the relief by a clear preponderance of the evidence. *Warvelle on Vendors*, section 731; *Pomeroy on Contracts* (2d Ed.) section 136, 26 Am. & Eng. Enc. Law, 130.

The granting or refusing of specific performance rests within the sound discretion of the court. *Warvelle on Vendors*, section 731; *Pomeroy on Contracts* (2d Ed.) sections 35-46; 20 Enc. Pl. & Pr. 390; *Skeen v. Patterson*, 54 N. E. 196; *Maltby v. Thews*, 49 N. E. 486; *Clipson v. Villars*, 37 N. E. 695; *Crandall v. Willig*, 46 N. E. 755; *Reid v. Mix*, 55 L. R. A. 706; *Davenport v. Latimer*, 31 S. E. 630; *Dewey v. Spring Valley Land Co.*, 73 N. W. 565; *McGrillis v. Copp*, 12 So. 643; *City of New Orleans v. N. O. & N. E. Ry.*, 10 So. 401; 3 Pom. Eq. Jur., section 1404; *Atchinson, etc., Co. v. Chicago & W. I. R. Co.*, 44 N. E. 823; *Kelly v. York Cliffs Implement Co.*, 47 Atl. 898.

Equity will not enforce a contract when to do so would work a hardship. Pomeroy on Contracts (2d Ed.) section 185; Warvelle on Vendors, section 731; Easton v. Lockhart, 10 N. D. 181, 86 N. W. 697.

MORGAN, C. J. The plaintiff seeks to compel the defendant to specifically perform a written contract for the sale of real estate upon what is commonly called the "crop-payment plan." The contract was entered into between the defendant and one Hegre on the 4th day of May, 1898, and filed for record by the defendant on June 27, 1899, in the office of the register of deeds of Grand Forks county. The contract provided that said Hegre should pay \$2,850 for the land (160 acres), by delivering at a specified elevator, in defendant's name, not less than one-half of all the crops grown on said land, free of all expense to defendant. At the time said contract was entered into, said Hegre was farming said land, and eighty acres adjoining the same, as defendant's tenant, under a written lease, which had also been filed for record. The written contract contained no stipulations, nor mention of said lease. In 1898 and 1899 the 160 acres and the eighty acres adjoining were cropped by Hegre, and the one-half crop raised on the 240 acres turned over to the defendant, without any accounting or settlement as to which portion should be applied on the contract, and what portion on the lease. Under the terms of the lease, defendant was to furnish the seed grain and pay a part of the expenses of threshing, and was to receive one-half of the crop. In the fall of 1899, or the winter of 1900, Hegre was not able to pay the threshing bill, and was not able to furnish the seed grain for the 1900 crop, and agreed to give up the contract of sale, and to continue to occupy the land and cultivate it under the lease, and the contract was thereafter abandoned, and the lease became the instrument under which the 240 acres was occupied and cultivated by Hegre as defendant's tenant. The defendant positively testifies to these facts. Hegre does not expressly deny them. On the contrary, his testimony at least sustained defendant's testimony on this point, so far as they acted under the terms of the lease, although he says, in effect, that the contract was not abandoned by express agreement. The record amply sustains the contention that the contract was abandoned, and that the lease was acted upon entirely in the accounting and annual settlements between the parties. The defendant annually furnished the seed, and

paid his share of the threshing bill. He gave directions in regard to the farming operations, and they were followed by Hegre. He built a barn upon the place after 1899 at a cost of about \$300. He dug wells on the place at considerable expense. He paid the taxes. He repaired the dwelling house and moved it to a better location. In all, he expended over \$400 in improvements on the farm. He was not required to make these improvements. They were made without any agreement or expectation of being reimbursed therefor, and were made by him as the owner of the land. He was not required to do any of these things under the contract, and such acts, acquiesced in by Hegre, are inconsistent with the fact that they were acting under the sale contract. These facts, together with defendant's positive testimony, amply sustain the fact that the contract of sale was abandoned by mutual agreement and consent. The trial court so found as follows: "That in the fall of 1899, after the close of the farming season for that year, at Northwood, North Dakota, the said B. J. Hegre and the defendant mutually agreed to abandon said contract of sale, and to be no longer in any manner bound by any of its terms; that said vendee having concluded that, by reason of lack of means, he would be unable to fulfill its terms on his part." "That during said years 1900, 1901, 1902 and 1903, it was understood between the defendant and the said Hegre that the latter occupied all of the said premises as a tenant of the defendant, and that said parties were in no manner acting in pursuance of the terms of said contract of sale, but were in all things following the aforesaid lease."

A written contract for the sale of land may be abandoned or annulled by the parties thereto by parol agreement. This has been recently decided by this court in *Mahon v. Leech*, 11 N. D. 181, 90 N. W. 807, and followed later in *Wadge v. Kittleson*, 12 N. D. 452, 97 N. W. 856.

In April, 1903, Hegre assigned the contract of sale to the plaintiff, Haugen, and also conveyed to him, by quitclaim deed, the 160 acres covered by the contract of sale. The consideration recited in the deed is the sum of \$2,000. There is no evidence outside of the deed that any payment was made of said sum, or any part thereof. Hegre remained in possession of the land thereafter. Soon after this assignment was made and the deed given, Haugen interviewed the defendant, and informed him that he had bought the land, and asked him how much Hegre owed him on the contract, and stated that he was willing to pay whatever sum remained

unpaid. He was informed by the defendant that he did not know how much was unpaid, as his papers were not with him, and that he had no account of it, but that he would get it in a week or two, and come down and settle with him on the contract; that Hegre owed him about \$100 besides. Haugen said he would pay this also. Defendant also stated to him that it would make no difference to him where he would get his money. On these facts, plaintiff claims that defendant is estopped from now asserting that the written contract had been annulled or abandoned by the parties before the assignment and deed were given to the plaintiff.

The contract of sale was filed for record, but no estoppel was thereby raised, by reason of which defendant is prevented from showing a change in the contract. The recording of it did not affect the title in any way. If defendant is estopped by virtue of having recorded it, he would be by virtue of having entered into the contract. The evidence fails to show that plaintiff was misled or in any way deceived by, or at all relied upon, such record, when he took an assignment from Hegre. The contract was an executory one, under which a deed was not to be given until all payments were made. The contract stated nothing to the effect that performance of the contract had been fully made. If plaintiff paid anything for the assignment, he was not warranted in so doing from any allegations of the contract. As to the material matter of performance, or whether a different agreement had been consummated, the contract, as recorded, had no binding effect upon any one, more than to put everybody upon inquiry. The record of it was notice of no fact as to the title to the land, except that such a contract was entered into at some time. No authorities are cited to sustain this contention, and none have been found.

What occurred between the parties after the assignment was made is equally ineffectual as grounds on which to assert an estoppel. Such a claim is conclusively answered by the statement of the fact that plaintiff parted with nothing on the strength of what was there stated. If he parted with anything at all on the transaction, it was done before this conversation. He does not claim that he took the deed on the strength of the recording of the contract, nor that he was in any way deceived or misled, or paid anything in reliance on what was said by the defendant when interviewed after he had taken the assignment. The evidence therefore fails to show any facts essential to an estoppel in pais. There was no change of

position by reason of what was said, nor damage. Herman on Estoppel, section 3.

It is intimated that plaintiff furnished Hegre the seed wheat in 1903 on the strength of the statement made by the defendant. The record does not sustain any such contention. It is not shown that he furnished all the seed, and not shown that he was not paid for it, to say nothing of the fact that it is not shown that it was furnished in reliance on the statements made by defendant. Nor is it shown whether such seed grain was furnished before or after the assignment. To enforce an estoppel, the proof must be clear. It will not be inferred. Herman on Estoppel, section 969; 11 Enc. of Law, p. 424. There is no evidence showing any act done by the plaintiff after the assignment on which an estoppel can be based. What was said by defendant and plaintiff during this conversation has no binding force either as a contract or ratification or an estoppel. Defendant could not have enforced payment of the unpaid purchase money by reason of what plaintiff there stated, and the same is true as to the plaintiff.

After a review of all the evidence under section 5630, Rev. Codes 1899, the judgment is affirmed. All concur.

(102 N. W. 311.)

B. G. CANFIELD v. A. L. ORANGE.

Opinion filed January 9, 1905.

Real Estate Broker — Compensation.

1. Defendant made a contract with plaintiff whereby the latter was employed to effect a sale of the former's land within a given period for cash so as to yield the defendant \$2,500, and the plaintiff was to receive as her compensation all that she could obtain for the land above that sum. Plaintiff procured a purchaser, who agreed to buy the land for \$2,880, and she made an arrangement with him whereby the sum of \$2,500 cash was to be paid to defendant, and plaintiff would receive the purchaser's notes secured by mortgage on the land for the remainder of the purchase price. The sale was prevented by defendant's refusal to convey. *Held*, that defendant is liable to the plaintiff for the loss which she suffered.

The Broker's Profits the Measure of Damages.

2. The measure of plaintiff's loss is the profit she would have made had the sale been consummated.

False Certificate of Acknowledgment and Subsequent Signing by Witness Not Material Alterations.

3. Attaching a false certificate of acknowledgment to the paper upon which the contract was written, and the signing of the agreement by the plaintiff and a witness, all done without defendant's knowledge, some time after its execution by him, are not material alterations.

Appeal from District Court, Barnes county; *Glaspell, J.*

Action by B. G. Canfield against A. L. Orange. Judgment for defendant, and plaintiff appeals.

Reversed.

Young & Wright and *S. M. Lockerby*, of counsel, for appellant.

Where a broker closed a deal and sent notice by mail within the prescribed time, his right to commissions was not affected by any failure of the mails to deliver the information. *Gibbons v. Sherwin*, 44 N. W. 99; *O'Connor v. Semple*, 15 N. W. 136.

An agency giving a broker the exclusive right to sell for a stated period, and giving him all that he can get over a stated amount, is not revocable at the pleasure of the principal, after the agent has rendered substantial services in the performance of his contract. *Stringfellow v. Powers*, 4 Tex. Civ. App. 199; *Blumenthal v. Goodall*, 26 Pac. 906; *Levy v. Rothe*, 17 Misc. Rep. 402, 39 N. Y. S. 1057; *Ward v. Fletcher*, 124 Mass. 224; *Moses v. Bierling*, 31 N. Y. 462; *Attix v. Delan*, 5 Ia. 336; *Glover v. Henderson*, 120 Mo. 367, 25 S. W. 175.

The compensation is earned when plaintiff produced a purchaser upon the described terms, and the inability of defendants to convey was an independent matter, for which they, not plaintiffs, were responsible. *Hamlin v. Schutle*, 27 N. W. 301; *Mooney v. Elder*, 56 N. Y. 238; *Hannan v. Moran*, 38 N. W. 909.

A broker is entitled to his commissions, either when he has produced and presented to his principal a person who is ready, willing and able to purchase, or when he has entered into a valid and enforceable contract with such proposed purchaser. *Walsh v. Hastings*, 38 Pac. 324; *McFarland v. Lillard*, 28 N. E. 229; *Hopwood v. Corbin*, 18 N. W. 911; *Gelatt v. Ridge*, 23 S. W. 882, 38 Am. St. Rep. 683; *Cassady v. Seely*, 29 N. W. 432; *Phelan v. Gardner*, 43 Cal. 306; *Neilson v. Lee*, 60 Cal. 555; *Gauthier v. West*, 47 N. W. 656; *Hopwood v. Corbin*, 18 N. W. 911; *Putzel v. Wilson*, 49 Hun. 220, 38 N. Y. S. 81.

It is immaterial that the negotiations were conducted by plaintiff's husband, acting as her agent. She had a right to employ whomever she saw fit to aid her. *Carter v. Webster*, 79 Ill. 435; *Barthell v. Peter*, 60 N. W. 429, 43 Am. St. Rep. 906; *Leonard v. Roberts*, 36 Pac. 880.

The addition of a false certificate of acknowledgment does not constitute a material alteration, because such acknowledgment does not entitle it to record or change the character of the proof required to establish its execution. *Arn v. Mathews*, 18 Pac. 65; 2 Cyc. 205; 2 Am. & Eng. Enc. Law (2d Ed.) 245.

If an officer, to whom an instrument is delivered for acknowledgment, is mistaken as to the forms the law requires to be observed, it should not militate against the person delivering it. It at most is but the spoliation of a stranger, innocently made, which does not invalidate a contract. *Kingan & Co. v. Silvers*, 37 N. E. 413; *Ames v. Brown*, 22 Minn. 257; *Colson v. Arnot*, 57 N. Y. 253; *Union Nat. Bank v. Roberts*, 45 Wis. 373.

Thorp & Thorp, for respondent.

Appellant entered into a contract with one Collins, under the terms of which Collins only agrees to pay \$1,160 cash in addition to the \$100 already paid, and to assume a mortgage for \$1,200 and to pay the balance of \$480 in one, two and three years, according to the terms of another mortgage to be given back on the land to Canfield by Collins. Respondent would not receive the full amount of the purchase price until he had made a conveyance to Canfield or Collins. But respondent under his contract with his broker was to receive his money when he conveyed the land, and the latter had no right to assume that respondent would consent to trust the Canfields with the title that they might raise the money on the premises conveyed.

A broker's contract is not performed by producing a party on the last day of the period given him in which to sell, but who asks for further time. *Watson et al. v. Brooks et al.*, 3 Pac. 679.

The agent must affirmatively show that he has performed his duty in conformity with the authority conferred upon him, and within the time limited, before he can recover his commission. *Dent v. Powell*, 61 N. W. 1043; *Blodgett v. Sioux City & St. P. Ry. Co.*, 19 N. W. 799; *Freedman v. Gordon*, 35 Pac. 879; *Seimsen v. Homan*, 53 N. W. 1012; *Greusel v. Dean*, 67 N. W. 275; *Iselin v. Griffith*, 18 N. W. 302.

Burden is on the broker claiming commissions to show all facts necessary to a full performance by him of his undertaking. 23 Am. & Eng. Enc. Law (2d Ed.) 918. And that he has performed his whole duty. *Masten v. Griffing*, 33 Cal. 111; *Blumenthal v. Goodall*, 25 Pac. 131.

Before a broker or customer is entitled to a deed and conveyance of the premises, he must tender to the owner the purchase price under an agreement entered into in pursuance of the authority vested in the broker. *Dent v. Powell*, 61 N. W. 1043; *Sawyer v. Brossart et al.*, 25 N. W. 876; *Baker v. Holt*, 14 N. W. 8.

Respondent should not be precluded from defending upon one ground because he placed his repudiation upon another. *Gilbert v. Baxter*, 32 N. W. 364.

The broker must produce and disclose to the owner the proposed purchaser before he is entitled to his commissions, or tender an enforceable contract containing only such terms as are authorized. *Baars v. Hyland*, 67 N. W. 1148; *Hurd v. Neilson*, 69 N. W. 867; *Hannan v. Fisher*, 46 N. W. 225; *Gunn v. Bank of California*, 33 Pac. 1105; 23 Am. & Eng. Enc. Law (2d Ed.) 915, 916; *Hayden v. Grillo*, 35 Mo. App. 647; *Stinde v. Sharff*, 36 Mo. App. 15; *Hackman v. Gutweiler*, 66 Mo. App. 244.

When the terms of the offer contemplated by the owner are changed by the broker, the broker is entitled to no commissions. *Berry v. Tweed*, 61 N. W. 858; *Sawyer v. Bowman*, 59 N. W. 27; *Cremer v. Miller*, 57 N. W. 318; *Flower v. Davidson*, 46 N. W. 308; *Smith v. Allen*, 70 N. W. 694; *Balkema v. Searle*, 89 N. W. 1087; *Muffatt v. Gott*, 42 N. W. 149; *Speer v. Craig*, 27 Pac. 891; *Field v. Small*, 30 Pac. 1034; *Thomas v. Joslin*, 15 N. W. 675; *Scribner v. Hazeltine*, 44 N. W. 618; *Huffman v. Ellis*, 90 N. W. 352; *Jackson et al. v. Badger*, 26 N. W. 908.

An acknowledgment of an instrument, and the signature of an attesting witness, without the knowledge and consent of the maker thereof, are material alterations. Civil Code, 3938; 2 Am. & Eng. Enc. Law (2d Ed.) 185, 186; 2 Am. & Eng. Enc. Law (2d Ed.) 203, 245; *Cutler v. Rose*, 35 Ia. 456; *Adams v. Frye*, 3 Metcalf 103.

ENERUD, J. Plaintiff sues to recover \$380 damages for the breach of a written contract made by defendant on April 16, 1902, and which was, in substance, as follows: The defendant empowered plaintiff to sell for him a quarter section of land "for the sum of \$2,500 net, to be paid upon the terms as follows: As per contract

to suit purchaser. * * * The right is reserved to revoke this agency in writing after November 1st, 1902. The second party agrees to try and sell the above land, and for such services the first party agrees to pay to the second party all what he may get in excess of twenty-five hundred dollars. When second party finds purchaser the first party agrees to deed by warranty deed, free from all incumbrances, and first party agrees to furnish abstract of said land." The nature of the defense interposed will sufficiently appear in the subsequent discussion of the questions arising on this appeal. The issues were, by stipulation, submitted to the court for trial without a jury. The trial court found for defendant, and ordered judgment, dismissing the action on the merits. The plaintiff appealed from the judgment, and demanded a new trial of the entire case, under section 5630, Rev. Codes 1899, and has had a statement of the case properly settled for that purpose.

The evidence shows without substantial dispute that pursuant to the contract above mentioned the plaintiff, in good faith, advertised the land for sale, and sought to get a purchaser. On October 27, 1902, she induced one R. E. Collins, of South Dakota, to agree to buy the land for \$2,880, and on that day made an agreement with Collins, which was reduced to writing, and reads as follows:

"Sanborn, N. D., Oct. 27, 1902.

"Received of Robert E. Collins, a check for one hundred dollars to apply on payment for the $w\frac{1}{2}$ of $se\frac{1}{4}$ and the $e\frac{1}{2}$ of the $sw\frac{1}{4}$ of section 34, township 140, range 61. The further sum of eleven hundred dollars to be paid by Mr. Collins when abstract and warranty deed is furnished. Mr. Collins agrees to assume a mortgage of \$1,200 which there is to be on said land. Said mortgage to draw interest at the rate of 6 per cent per annum. The purchase price of said land is to be \$2,880.00. The balance due on said land after Mr. Collins pays the \$1,200.00 and assumes the mortgage of \$1,200.00, is to be paid on the following dates: \$180.00 on or before November 1, 1903; \$150.00 on or before November 1, 1904; \$150.00 due on or before November 1, 1905, said sums to draw interest at 6 per cent per annum. Mr. Collins agrees to give a mortgage back on said land for the amount remaining unpaid after the \$1,200.00 cash is paid and the assumption of the \$1,200.00 mortgage.

A. A. CANFIELD.

"Correct—Robert E. Collins."

The evidence clearly shows that Mr. Collins made the agreement to purchase in good faith, and was anxious to complete the bargain. On October 28, 1902, plaintiff notified defendant, by registered letter, that she had sold the land, and that the purchase money would be ready in a few days to be paid to defendant upon delivery of the deed and abstract by him. This letter reached defendant's postoffice October 30, 1902, but he asserts that he did not actually receive it until November 6, 1902. On November 1st the defendant notified plaintiff by letter that he had withdrawn the land from sale. On the same day, after receipt of this letter, plaintiff's husband, acting for her, talked with defendant by 'phone, and advised him of the fact that a sale of the land had been effected, and demanded that defendant execute the necessary deeds and furnish an abstract; but the defendant refused to do so on the ground that he had, by letter, withdrawn the land from sale. By reason of defendant's refusal to convey the land, the plaintiff lost the profits she would have made by her bargain with Collins. It is undisputed that plaintiff had made arrangements to advance \$1,300 for Collins, which, with the \$1,200 furnished by the latter, was to be paid to defendant in payment of the sum of \$2,500 which he was to have for the land. The plaintiff intended to have the land deeded to herself in order to mortgage it for a loan of \$1,200 to reimburse herself to that extent for the money advanced by her, and she would then deed to Collins, who was to assume this mortgage, and execute a second mortgage for \$480 to plaintiff to secure the payment to her of the remainder of the purchase price. It is claimed by defendant that this bargain between plaintiff and Collins was not in accordance with the terms upon which plaintiff was authorized to sell, and hence that plaintiff had failed to furnish a buyer of the land ready, able and willing to buy upon the terms fixed by defendant. This contention is unsound. The contract between plaintiff and defendant was not strictly an agency contract, whereby the plaintiff was made the agent of defendant to negotiate a sale upon stated terms and conditions which were to be the measure of the agent's authority. Neither is it an agreement merely that plaintiff was to be paid a given commission for finding a purchaser to whom defendant could sell the land on given terms. The effect of the contract was to empower the plaintiff to negotiate any bargain she saw fit within the time limited, which would yield the defendant \$2,500 in cash, for a conveyance of the land, payable on delivery of a deed conveying a clear title. It was no concern of the defendant what bargain the plaintiff made,

or with whom she made it, provided it enabled the defendant to effect an immediate sale of his land for \$2,500 cash, without being burdened with any conditions or obligations other than to give a warranty deed conveying a clear and unincumbered title. We say that the contract contemplated a cash sale, because that is the understanding which the evidence shows the parties themselves had of the contract. It is also the construction assumed by counsel, and is the interpretation most favorable to defendant. It is undisputed that the plaintiff had in good faith effected an arrangement whereby the defendant's land would be sold so as to yield the defendant \$2,500 in cash. The consummation of the bargain was prevented solely by the refusal of the defendant to comply with his obligation to convey according to his contract with plaintiff. The plaintiff thereby lost \$380, which is the amount she would have made had the defendant performed his obligation. The notes and mortgage which plaintiff was to receive from Collins would presumptively have been worth their face. Rev. Codes 1899, section 5012; *Anderson v. Bank*, 6 N. D. 497, 72 N. W. 916.

The attempted cancellation by defendant of his contract with plaintiff, on November 1st, was ineffectual, because the contract was not revocable until after November 1, 1902, and plaintiff had, before the attempted revocation, completed negotiations for a sale, and had notified the defendant of that fact during the life of the contract.

The fact that plaintiff agreed with Collins to accept notes secured by mortgage for part of the purchase price did not affect the defendant's rights. The defendant was entitled to \$2,500 in cash, and no more, and this he would receive by the arrangement made. The plaintiff was entitled to all that was received for the land above that amount. The agreement by plaintiff to take Collins' notes for the remainder of the purchase price exonerated the defendant from all liability to plaintiff therefor. We cannot conceive of any ground for objection on defendant's part to such an arrangement. The same result would have been accomplished if plaintiff had gone through the form of advancing \$480 for Collins to defendant and then received the money back from the latter.

It is true that no money was actually tendered to defendant, but a tender would have been a useless formality, because the defendant had unequivocally repudiated his contract with plaintiff.

It is also claimed that plaintiff had been guilty of a material alteration of the writing which evidenced the contract between her

and defendant. The facts upon which this defense is based are that at some time after defendant had signed the contract the plaintiff attached her signature to it; and one Lilly, who was a justice of the peace, attached a certificate of acknowledgment thereto, and also signed the document as a witness. Evidence was introduced tending to show that the certificate of acknowledgment was false, and that Lilly's signature as an ostensible witness was unwarranted. The alleged alteration was not material. The written contract itself was not changed, or its legal effect in any manner affected. It was not a contract that affected the title to real property, and the acknowledgment, even though it enabled the plaintiff to have it spread upon the public records, did not change the character of the document, or affect defendant's title. 2 Cyc. 142; 2 Enc. of Law (2d Ed.) 185; Fuller v. Green, 64 Wis. 159, 24 N. W. 907, 54 Am. Rep. 600.

The judgment is reversed, and the district court is directed to enter judgment in favor of the plaintiff and against the defendant for the sum of \$380, and interest thereon at seven per cent per annum from November 1, 1902, and for the taxable costs and disbursements. All concur.

(102 N. W. 313.)

WILLIAM F. LEONARD v. ROBERT L. FLEMING, OWEN T. REEVES
AND J. L. LAVALLEY.

Opinion filed January 14, 1905.

Date of Deed Is Presumed Correct, and Delivery Made on Such Date.

1. A deed produced at the trial and offered in evidence by the grantee is presumed to have been delivered to such grantee on the day of its date, and its date is presumed to be the true date.

Deed Delivered Before, and Recorded After, an Attachment, Prevails Over the Attachment.

2. A purchaser of real estate at a sheriff's sale under attachment proceedings acquires no title as against a deed delivered before the levy of the attachment, but recorded after the attachment and before the judgment.

Evidence — Declarations of Grantor.

3. Declarations or admissions of a grantor, made after he has parted with the title, are not competent to defeat such title, where there is no evidence of fraud or conspiracy against creditors.

Evidence — Fraud.

4. Evidence considered, and *held* not to show fraud, and not to overcome the presumption that the deed was delivered as of its date.

Appeal from District Court, Barnes county; *Glaspell, J.*

Action by William F. Leonard against Robert L. Fleming and others. Judgment for defendants; plaintiff appeals.

Reversed.

Young & Wright, for appellant.

An unrecorded deed or mortgage prevails over a subsequent attachment. *Kohn v. Lapham*, 82 N. W. 408; *Murphy v. Plankinton Bank*, 83 N. W. 575; *Bateman v. Backus*, 4 Dak. 433, 34 N. W. 66; *Roblin v. Palmer*, 67 N. W. 949; *Norton v. Williams*, 9 Ia. 528; *Plant v. Smythe*, 45 Cal. 161.

Notice of *lis pendens* must state that the land described has been attached. *Buxton v. Sargent*, 7 N. D. 503, 75 N. W. 811; *McCarthy v. Speed*, 80 N. W. 135; *Smith v. Gale*, 144 U. S. 509, 36 L. Ed. 521, 12 Sup. Ct. Rep. 674.

An attachment bond in a penal sum less than required by law is void, and cannot be amended. *Drake on Attachments*, section 139 et seq., and section 146; 5 Enc. Pl. & Pr. 33.

The death of the defendant in attachment proceedings operates to dissolve the attachment and render void a subsequent judgment. *Yankton Sav. Bank v. Gutterson*, 90 N. W. 144; *Meyers v. Mott*, 29 Cal. 359, 89 Am. Dec. 49; *Hensley v. Morgan*, 47 Cal. 622; *Day v. Superior Court of San Francisco*, 61 Cal. 489; *Ham v. Cunningham*, 50 Cal. 365; *Sweringen v. Eberius' Adm'r*, 38 Am. Dec. 463; *Franklin Bank v. Bathelder*, 39 Id. 610; *Black on Judgments*, 199.

Such is the law in this state except as changed by statute. Section 5434, Code of Civil Proc., 6469, 6470, 6471, Probate Code. *Anheier v. Signor*, 8 N. D. 499, 79 N. W. 983; *Bunker v. Taylor*, 83 N. W. 555; *O'Neil v. Murray*, 50 N. W. 619; *Brettell v. Deffenback*, 60 N. W. 167; *McCormick Harvesting Mach. Co. v. Snedigar*, 53 N. W. 83.

A judgment against a person, who is dead before completion of service upon him, is void and subject to collateral attack. *Kager v. Vickery*, 49 L. R. A. 153; *Hodgson v. McKinstry*, 42 Pac. 929; *Kansas, O. & T. Ry. Co. v. Smith*, 19 Pac. 636; *Rice Co. Comm. v. Lawrence*, 29 Kan. 158; *McLaughlin v. State*, 17 Kan. 283; *Richards v. Thompson*, 43 Kan. 209, 23 Pac. 106; *McCulloch v.*

Norwood, 58 N. Y. 562; Coleman v. McNulty, 57 Am. Dec. 229; Reid v. Holmes, 127 Mass. 326; Danford v. Danford, 111 Ill. 236; Granes v. Ewart, 11 S. W. 971; Crosley v. Hutton, 11 S. W. 613; Williams v. Hudson, 6 S. W. 261; State ex rel. v. Tait, 18 S. W. 1088; Richards v. Thompson, 23 Pac. 106; McCormick v. Paddock, 30 N. W. 602; Jennings v. Simpson, 11 N. W. 880.

Declarations of a grantor after the date of his grant are not admissible to overcome his deed. 1 Am. & Eng. Enc. Law (2d Ed.) 685; Bump on Fraudulent Conveyances, section 599.

A party cannot prove or disprove title to land by his adversary's admissions of title or want of it. Walker v. Dunsbaugh, 20 N. Y. 170; Clark v. Baird, 9 N. Y. 183; Terry v. Chandler, 16 N. Y. 354, 69 Am. Dec. 707n.

Lee Combs, for respondents.

A notice of lis pendens affects a purchaser with constructive notice of all that appears on the face of the pleadings when he takes his deed, and such as inquiry pursued with diligence would bring to his knowledge. Jones v. McNarrin, 68 Me. 334, 28 Am. Rep. 66; Tilton v. Cofield, 93 U. S. 163, 23 L. Ed. 858; Lewis v. Quinker, 59 Ky. 284; Amer. Exchange Bank v. Andrews, 59 Tenn. 306; Center v. Planter's & Merchant's Bank, 22 Ala. 743; Allen v. Poole, 54 Miss. 323.

The alleged deed was never delivered or accepted by the parties thereto, and no interest in the land passed to plaintiff. Hulick v. Scovil, 9 Ill. 159; Church v. Gilman, 15 Wend. 656, 30 Am. Dec. 82.

The statutory presumption, that a deed was delivered on the day of its date, cannot prevail when the deed was executed in another state, as there is no presumption that the statutes of one state are the same as those of another. Murphy v. Collins, 121 Mass. 6; Downs v. Minchow, 30 Ala. 86; Gordon v. Ward, 16 Mich. 360; Rohan Bros. Boiler Mfg. Co. v. Richmond, 14 Mo. App. 595; Rundy v. Rio Grande W. Ry. Co., 8 Utah 165, 30 Pac. 366.

The presumption that a deed was delivered at the time of its date may be rebutted. Cain v. Robinson, 20 Kan. 456; Cutts v. York Mfg. Co., 18 Me. 190; Banning v. Edes, 6 Minn. 402.

Registering a deed is not a delivery unless it appears that the grantee knew of it and assented thereto. Alexander v. Dekermel, 81 Ky. 345; Maynard v. Maynard, 10 Mass. 456, 6 Am. Dec. 146; Deere v. Nelson, 34 N. W. 809; O'Connor v. O'Connor, 100 Ia. 476, 69 N. W. 676; 1 Dembitz on Law of Titles, 362.

Defendants' adverse possession for ten years and payment of taxes by them for that period, made them absolute owners of the land. The possession of their vendees was the possession of the defendants. *Schneller v. Plankinton*, 12 N. D. 562, 98 N. W. 77; *Whitney v. Wright*, 15 Wend. 171; *Jackson v. Johnson*, 5 Cow. 74, 15 Am. Dec. 433; *Hale v. Gladfelder*, 52 Ill. 91.

Taxes may be paid by claimant or on his behalf. *J. B. Streeter, Jr., Co. v. Frederick*, 11 N. D. 300, 91 N. W. 692; *Timmons v. Kidwell*, 27 N. E. 756; *Dawley v. Van Court*, 21 Ill. 460; *Fell v. Cessford*, 26 Ill. 525.

Failure to file sufficient undertaking in attachment does not render the attachment void except as to the defendant in the attachment case. *O'Farrell v. Stockman*, 19 Ohio St. 296; *Kemps, Lessee, v. Kennedy*, 5 Cranch 173; *Baxter v. Smith*, 4 Pac. 35.

An attachment is a proceeding in rem, and if defendant dies before service is complete a judgment may be rendered against him, and it cannot be attacked collaterally. *French v. Baker*, 21 Ill. App. 432; *Oswald v. Kampmann*, 24 Fed. 36; *Thacker v. Chamber*, 24 Tenn. 313, 42 Am. Dec. 431; *Harrison v. Pender*, 57 Am. Dec. 573; *Lowber & Willmar's App.*, 42 Am. Dec. —02; *Yaple v. Titus*, 41 Pa. St. 195; *Jennings v. Simpson*, 11 N. W. 880; *Day v. Goodwin*, 73 N. W. 864; *Gulickson v. Bodkin*, 80 N. W. 783; *Hahn v. Kelly*, 34 Cal. 391.

A ten-year-old judgment cannot be attacked collaterally, where there has been no motion to vacate or modify it and no good reason has been shown for the failure to do so. *Campbell v. Jones*, 52 Ark. 493, 12 S. W. 1016; *Stocking v. Hanson*, 22 Minn. 546; *Beach v. Reynolds*, 53 N. Y. 1.

MORGAN, C. J. Action to determine adverse claims to 160 acres of land situated in Barnes county. Plaintiff alleges in the complaint that he is the absolute owner thereof, and that the defendants claim it adversely to him. The plaintiff and the defendants claim the title from a common source. The plaintiff claims title and the right to possession through a warranty deed from George W. Toms and wife, dated on November 4, 1892, acknowledged on November 8, 1892, and recorded on January 17, 1893. The defendants claim ownership by virtue of a sheriff's deed dated August 2, 1894, based upon attachment proceedings in an action commenced against George W. Toms, plaintiff's grantor, by one Compton, and levied upon the land on December 10, 1892. Plaintiff's grantor was a

nonresident of the state, and service is claimed to have been made upon him by the publication of the summons. Toms died on January 21, 1893, before the last publication of the summons was made. Judgment was rendered against the defendant on March 10, 1893, for the recovery of the sum claimed to be due; but the judgment provided that it was a judgment in rem, and to be enforced by the sale of the land attached only. There was no substitution of the personal representatives of Toms after his death. Whether this judgment was a valid judgment, and whether a sale thereunder operated to divest Toms' interest in the land, if any he had when the attachment was levied, we need not determine, as the merits are disposed of on another ground. The trial court found that the plaintiff has no interest in the land in suit, and that the defendants Fleming and Reeves are the owners thereof by virtue of the sheriff's deed issued to Fleming, and his subsequent conveyance to Reeves of an undivided one-half interest therein. The trial court also found that the defendants were the owners of this land by reason of the actual and open possession thereof for ten years, under the provisions of section 3491a, Rev. Codes 1899. Plaintiff appeals from a judgment dismissing his action, and demands a review of the entire case, under section 5630, Rev. Codes 1899.

The defendants contend that plaintiff's deed was not delivered, and, if delivered at all, not until after the attachment was levied, and consequently conveyed no title as against the attachment proceedings under which the land was sold to the defendant Fleming. The deed was produced by plaintiff at the trial, and offered in evidence by him. There is no evidence as to the time of delivery except the recitals of the deed. The fact of the making and delivery of the deed is not made an issue by the pleadings. The answer admits the delivery of the deed in express words, as follows: "Further answering, these defendants allege that said conveyance referred to was executed and delivered at a time when said Toms had no interest in or lien upon said property, and at a time when said Toms was not in possession of said real estate, and when he had not received the rents and profits thereof for more than one year prior to the execution and delivery of said purported conveyance." Under such an allegation, defendant is concluded from now asserting that there is no proof of the fact of delivery.

The time of the delivery of the deed is not shown by independent evidence. This fact is not of controlling importance. The statute provides that "a grant duly executed is presumed to be delivered at

its date." Section 3516, Rev. Codes 1899 (section 3230, Comp. Laws). In the absence of evidence to overthrow the presumption of delivery as of the date of the deed, the deed speaks for itself, and determines the time of delivery. The statute also settles the question of the correctness of the date of the deed. The presumption is that the deed is truly dated. Subdivision 23, section 5713c, Rev. Codes 1899. These statutory provisions are declaratory of what was the law before they were enacted. "It may be stated as a general rule that *prima facie* all documents must be taken to have been made on the day they bear date. * * * So a deed is presumed to have been executed (*Anderson v. Weston*, 6 Bing. N. C. 296) and delivered on the day it is dated." *Best on Presumptions*, section 133, p. 181; *Jones on Evidence*, section 45; *Ward v. Dougherty*, 75 Cal. 240, 17 Pac. 193, 7 Am. St. Rep. 151.

Counsel for defendants insists that the law of this state in reference to the presumption of delivery does not apply to this deed, as it was executed in the state of Missouri. The contention is of no force. The presumption is that the law of a foreign state is the same as the common law, in the absence of a showing as to what the foreign law is. Subdivision 41, section 5713c, Rev. Codes 1899.

It is insisted that the presumption that the deed was delivered on the day of its date has been overcome by the plaintiff's declarations and conduct concerning the land and the title thereto after it was executed and delivered. Such contention is based upon the fact that plaintiff, while acting as one of the three executors of the last will of George W. Toms, signed and verified the inventory of said estate, in which was included the land in question. It is claimed that the listing of this land in the inventory subscribed by the plaintiff, as executor, overcomes the presumption that the deed was delivered on the day of its date. We are agreed that the proof was not admissible under the allegations of the answer. If the inventory or the verification thereof was competent evidence in this case, it tends to show only that there was no delivery during the grantor's lifetime. The admissions in the answer render the evidence inadmissible. The plaintiff had the right to go into court for trial, relying on the fact that the delivery of the deed was admitted for all purposes. If the inventory, with the attached verification, be given full effect, it does not show a delivery at a time different from its date, but it simply tends to show that it was not delivered at all during the grantor's life. Under the evidence in this case, a delivery after Toms' death would not be effectual for any purpose.

The allegations of the answer must be construed as admitting a delivery during the life of the grantor, and the contents of the inventory tending to show otherwise are not admissible and are irrelevant under the allegations of the answer. No delivery of the deed would be effectual in this case after death; hence the allegations of the answer can refer only to a delivery by the grantor in his lifetime.

It is also claimed by the defendants that the presumption that the deed was delivered on the day of its date has been rebutted by the statements in a certain letter written by plaintiff to one Wije on April 22, 1902, concerning the land in question. This letter was an answer to one written him by Wije. The contents of the Wije letter are not given in the record. What it contained is therefore not before us; hence the effect of plaintiff's answer as admissions is not clear. He stated in his letter: "I have been unable to find any record of the mortgage referred to and do not like to execute deed without some further information as to the facts in the case, although I presume they are as stated by you. If you will forward me the abstract of title of this land showing disposition of the mortgage and clear chain of title to the present owner of same, I will give the matter prompt attention and return all papers with executed deed, if I find no objection to making same." There is nothing in this letter to show that plaintiff's deed was never executed or delivered. If it did contain such an admission, it would be inadmissible under the admissions of the answer. What has been said in respect to the contents of the inventory is applicable also to this letter. Neither of them can be given any weight to prove non-delivery of the deed in view of the answer.

It is claimed that defendants' title to the land is valid by virtue of the provisions of section 3491a, Rev. Codes 1899, providing that all titles to real property vested in any person who has been in the "actual open, adverse and undisputed possession" of the land under such title for ten years, and shall pay all taxes legally levied on such land during such time, are declared good and valid in law. Two valid grounds exist to answer this contention: (1) The deed under which the defendants claim was not executed until August 2, 1894, less than ten years before this action was commenced. It is true that the land was sold on April 21, 1893, and a certificate of sale issued to the defendant Fleming. But such certificate vested no title in the purchaser not subject to redemption within a year after sale. The right to the possession of the land did not follow,

as a matter of law, in favor of the purchaser at the sale, and there is no evidence that possession was actually taken thereunder. (?) There is no evidence that the defendants, personally or by tenants or grantees, were in the actual possession of the land for ten years before the commencement of this action. The defendant, claiming under the sheriff's deed, and his grantee of an undivided one-half interest in the land, were at the time of the sale, and ever since have been, nonresidents of the state, and have never been in the actual possession of the land. At the time of the sale, and for some time thereafter, the land was wild, uncultivated land, with no one in actual possession thereof. There is a total failure to show actual possession for ten years, and the finding of the district court of that fact is entirely without evidence to sustain it.

Defendants claim that they, having attached the land in the Compton-Toms action before plaintiff's deed was recorded, and without notice of plaintiff's claim to the land, are entitled to the land under such sale, as innocent purchasers thereof. The sections of the Compiled Laws then in force, and controlling of this question, are as follows:

"Section 3293. Every conveyance of real property other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or incumbrancer, including an assignee of a mortgage, lease or other conditional estate, of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded.

"Section 3294. The term 'conveyance,' as used in the last section, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged or incumbered, or by which the title to any real property may be affected, except wills, executory contracts for the sale or purchase of real property, and powers of attorney."

"Section 4897. In an action affecting the title to property, * * * or whenever a warrant of attachment of property shall be issued * * * the plaintiff * * * may file for record with the register of deeds * * * a notice of the pendency of the action * * * and every person whose conveyance or incumbrance is subsequently recorded, shall be deemed a subsequent purchaser or incumbrancer and shall be bound by all the proceedings taken after the filing of such notice, to the same extent as if he were a party to the action."

A notice of *lis pendens* was filed by the plaintiff when the action in which the attachment was levied was commenced. We are satisfied that the attachment proceedings which culminated in the sheriff's deed have no effect as against the plaintiff's deed, although it was recorded subsequently to the attachment; and this, conceding that defendants had no notice thereof. The attachment is effective only as against the defendants' interest in the land when levied. The title had vested in this plaintiff before the attachment was levied. An attachment creditor is not a purchaser or incumbrancer, within the meaning of these sections. Plaintiff's title was perfected before the *lis pendens* was filed, and its record could not affect it. The *lis pendens* affects those acquiring interests after its filing, and not those acquired prior thereto. The attaching creditor gets only the interest of the defendant in the attached property, and such interest, having been conveyed prior to the attachment, was beyond its reach in cases like the one under consideration. As stated by the court in *Kohn v. Lapham et al.* (S. D.) 82 N. W. 408: "If plaintiff was in fact a purchaser or incumbrancer in good faith and without notice, he might, under section 3293, Comp. Laws, acquire a title superior to the title of the party whose deed is not recorded; but an attaching creditor is not a purchaser or incumbrancer in good faith and without notice, as he comes in under the defendant in the attachment suit, and simply acquires the title that such defendant had at the time the attachment proceedings were instituted." See, also, *Roblin v. Palmer*, 9 S. D. 36, 67 N. W. 949; *Bateman v. Backus*, 4 Dak. 433, 34 N. W. 66; *Lamont v. Cheshire*, 65 N. Y. 30; *Norton v. Williams*, 9 Iowa, 528; *Plant v. Smythe*, 45 Cal. 161; *Drake on Attachment* (6th Ed.) section 223.

It is further claimed that the deed was executed with intent to defraud creditors. Conceding that the defendants are entitled to raise this question, we find such claim entirely unfounded, under the evidence. The trial court made no finding on this question, and the defendants did not allege it to be fraudulent in their answer. This deed is attacked in the answer as void upon other grounds, and its fraudulent character is not there alleged in any way. Under these circumstances, a narration of the evidence relied on would not be useful for any purpose. It is sufficient to state that we have carefully considered it, and find that it wholly fails to establish a fraudulent transaction. The presumption that the transfer was made in good faith has not been overcome. To hold that fraud has been

shown in this record would be to presume fraud, which is contrary to the presumption in such cases.

It is claimed that Toms, the grantor in the deed to the plaintiff, made admissions after the deed was executed and delivered, and after the attachment was levied, to the effect that he was the owner of the land, and that such admission should be considered as overthrowing the presumption that the deed was delivered as of its date. These alleged declarations or admissions are not admissible under the answer, showing a delivery of the deed. Such declarations are not admissible to defeat the grantee's title when made after the grantor has parted with the title and possession of the property. If such admissions be competent to defeat a deed duly delivered, no security could be given to deeds, as they would overthrow such deeds when offered, as in the case when the person making them had no interest in upholding his former title. Jones on Evidence, section 242, and cases cited. In this case, as we have seen, there was no evidence of fraud in the execution of the deed. Hence such declarations are not admissible under the rule allowing such declarations in evidence to show fraudulent intent in a conveyance, or to show a conspiracy to defraud.

The judgment is reversed, and the district court directed to order judgment in accordance with the prayer of the complaint, except that no damages are allowed. All concur.

(102 N. W. 308.)

H. L. LOOMIS v. ARTHUR G. LEWIS, COUNTY AUDITOR OF CASS COUNTY.

Appeal from District Court, Cass county; *Pollock, J.*

Action by H. L. Loomis against Arthur G. Lewis, county auditor of Cass county. Judgment for defendant, and plaintiff appeals. Affirmed.

Morrill & Engerud, for appellant. *Emerson H. Smith*, State's Attorney, for respondent.

PER CURIAM. The plaintiff appeals from a judgment of the district court of Cass county, dismissing a special proceeding by mandamus to compel the county auditor to execute a tax deed. The same attorneys appear in this case as in *Patton v. Cass County*, 102 N. W. 174, in which an opinion has just been handed down.

The attorneys each agree and state in the briefs on file that the questions involved in this case are identical with those presented in *Patton v. Cass County*. Following the conclusion announced in that case, the judgment is affirmed.

ENGERUD, J., having been of counsel, took no part in the above decision.

(102 N. W. 1134.)

BEIDLER & ROBINSON LUMBER COMPANY, A CORPORATION, v. THE
COE COMMISSION COMPANY, A CORPORATION.

Opinion filed February 21, 1905.

**A Contract for Future Delivery of Grain or Other Property Is Valid
When Such Delivery Is Intended, Otherwise It Is a Wager and
Void.**

1. A contract for the sale of grain or other property to be delivered at a future date is valid only when the parties really intend and agree that the property is to be delivered by the seller and paid for by the buyer at the contract price. If the real intent is not to deliver, but to settle upon the difference in market quotations, the transaction is a mere wager, and is void.

Option Contracts — Evidence.

2. When the validity of a contract of sale for future delivery is involved, and it is shown that in numerous other and similar transactions no deliveries were made, but that settlements were made upon differences in market quotations, the person relying upon the validity of such a contract must make it satisfactorily and affirmatively appear that the contract was made with a view to actual delivery.

Gambling Transactions.

3. On an examination of the evidence, it is *held* that in making the contracts of sale involved in this case there was no intention to make delivery, and that they were mere wagers upon the rise and fall of prices, and therefore void.

Appeal from District Court, Cass county; *Pollock, J.*

Action by the Beidler & Robinson Lumber Company against The Coe Commission Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

George D. Emery, for appellant.

There must be a concurrence of both the contracting parties of the unlawful purpose or the contract will not be void. If one acts in good faith it is valid. *Mohr v. Miesen*, 49 N. W. 862; *McCarthy v. Weare Com. Co.*, 91 N. W. 33; *Donovan v. Daiber*, 82 N. W. 848.

The court erred in granting plaintiff's motion, after verdict, and ordering judgment in its favor, notwithstanding the verdict, and in entering judgment for the plaintiff. It is only where there is no substantial evidence to sustain the verdict and the moving party is hence entitled to a judgment as a matter of law, that the motion can be granted. *Kerman v. St. Paul City Ry. Co.*, 67 N. W. 71; *Manning v. City of New Orleans*, 60 N. W. 953; *Slivitske v. Town of Wien*, 67 N. W. 730; *Cruikshank v. St. Paul F. & M. Ins. Co.*, 77 N. W. 958; *Marguardt v. Hubner*, 80 N. W. 617; *Netzer v. City of Crookston*, 68 N. W. 1099; *Kreuzer v. Great Northern Ry. Co.*, 86 N. W. 413; *United States Fidelity & Guaranty Co. v. Seigman*, 91 N. W. 473; *Jacobson v. Johnson*, 91 N. W. 465; *Isherwood v. Jenkins Lbr. Co.*, 92 N. W. 230; *Clark v. Dayton*, 92 N. W. 327; *Jumiska v. Andrews*, 92 N. W. 470; *Lauritsen v. Amer. Bridge Co.*, 92 N. W. 475; *Sheely v. Duffy*, 61 N. W. 295; *Conover v. Knight*, 65 N. W. 371.

It was shown that not one single contract was carried by the customer to the date of maturity, nor was delivery intended or demanded by any customer, but the contracts were voluntarily settled by them or by the course of the market, before maturity. The fact that no deliveries were made is not evidence that the contracts were wagers and hence void. The evidence showed—without dispute—that it was defendant's custom to deliver the articles contracted for in every case where the contract matured, either by lapse of time or by demand under terms of the contract. Such contracts are valid in law. *Van Dusen-Harrington Co. v. Jungeblut*, 77 N. W. 970; *Donovan v. Daiber*, *supra*.

Where the evidence tends in any way to establish the cause of action or defense, it is error to take the case from the jury or direct a verdict. *Drakely v. Gregg*, 75 U. S. 242, 19 L. Ed. 409; *Hickman v. Jones*, 76 U. S. 197, 19 L. Ed. 551; *Baylis v. Travelers Ins. Co.*, 113 U. S. 316, 28 L. Ed. 989; *Young v. Ege*, 65 N. W. 249; *Hamburg v. St. Paul F. & M. Ins. Co.*, 71 N. W. 388; *Longley v. Daly*, 46 N. W. 247; *Stocklam v. Cheeney*, 28 N. W. 692; *Benham v. Purdy*, 4 N. W. 133; *Marcott v. Marquette H. & O. Ry. Co.*, 10 N. W. 53; *Houck v. Gue*, 46 N. W. 280; *Star Wagon Co. v.*

Matthiessen, 14 N. W. 107; Knapp v. Sioux Falls Nat. Bank, 40 N. W. 587; Sperry v. Etheridge, 19 N. W. 657; Citizens Bank v. Rhutasel, 25 N. W. 261; Fox v. Spring Lake Iron Co., 50 N. W. 872; Jamison v. McFarland, 74 N. W. 1033; Sweet v. Chicago, M. & St. P. Ry. Co., 60 N. W. 77; Suiter v. Park Nat. Bank, 53 N. W. 205; Haugen v. Chicago, M. & St. P. Ry. Co., 53 N. W. 769.

F. W. Ames and Morrill & Engerud, for respondents.

The test of the legitimacy of the transactions herein involved is whether both parties at the time that they were had, contemplated and intended to actually deliver and receive the commodity dealt in, or merely intended to "settle differences" based upon fluctuations of the market. Dows v. Glaspel, 4 N. D. 251, 60 N. W. 60; Irwin v. Wiliar, 110 U. S. 499, 28 L. Ed. 225; Lowe v. Young, 13 N. W. 329; Mohr v. Meisen, 49 N. W. 862; Barnard v. Blackhaus, 6 N. W. 252, 9 N. W. 595; Sprague v. Warren, 41 N. W. 1113; Rogers v. Marriott, 82 N. W. 21.

The court must determine whether the form is genuine or a mere cloak to conceal illegality. Dows v. Glaspel, 4 N. D. 251; Barnard v. Blackhaus, 6 N. W. 252, 9 N. W. 595; Sprague v. Warren, 41 N. W. 1113; Rogers v. Marriott, 82 N. W. 21.

In the face of all the conceded facts and circumstances, and especially the fact that defendant habitually made it a practice to settle differences with its customers and actual deliveries were made only in an infinitesimally small percentage of transactions, the presumption arises that the defendant intended to do just what it did—settle differences. The burden shifts to the defendant to rebut this presumption and show that deliveries were actually intended when the deals were made. Barnard v. Blackhaus, 9 N. W. 595; Sprague v. Warren, 41 N. W. 1113; Rogers v. Marriott, 82 N. W. 21; Board of Trade v. L. A. Kinney Co., 125 Fed. 72; Sharp v. Stalker, 52 Atl. 1120.

If there was any difference of opinion as to the conclusion to be drawn from the undisputed evidentiary facts, we next maintain that the defendant is concluded by the trial court's decision on that question. Both parties moved for a directed verdict on the evidence, and thereby requested and consented to a decision by the court. New England Mortgage Co. v. Great Western Elevator Co., 6 N. D. 407; 71 N. W. 130; Stanford v. McGill, 6 N. D. 536; 72 N. W. 938; First M. E. Church v. Fadden, 8 N. D. 152, 77 N. W. 615.

If there was a scintilla of evidence tending to support any other conclusion than the one adopted by the court, it was so extremely slight, that no jury mindful of the law and facts would be warranted in accepting it. Under such circumstances a directed verdict was proper. *Rogers v. Marriott*, 82 N. W. 21; *Woolsey v. C. B. & Q. Ry. Co.*, 58 N. W. 444; *Elliott v. Chicago, M. & St. P. Ry. Co.*, 150 U. S. 245, 14 Sup. Ct. Rep. 85; *Vanderford v. Foster*, 65 Cal. 49, 2 Pac. 736; *Jackson v. Haedin*, 83 Mo. 175; *Deyo v. New Central Railway Co.*, 34 N. Y. 9, 88 Am. Dec. 418.

If the directed verdict was proper, it follows that under the circumstances of this case, which did not involve any alleged technical failure of proof of some material fact, the court should order judgment notwithstanding the verdict. *Richmire v. Andrews & Gage Elev. Co.*, 11 N. D. 453, 92 N. W. 819; *Baxter v. Covenant Mut. Life Ass'n*, 83 N. W. 459; *Merritt v. Great Northern Ry. Co.*, 84 N. W. 321.

If the court could properly have directed a verdict, it could also order a judgment. *Calteaux v. Mueller*, 78 N. W. 1082; *Gammon v. Abrams*, 10 N. W. 479; *Dowagiac Mfg. Co. v. Schroeder*, 84 N. W. 14; *Baxter v. Covenant Mut. Life Ass'n*, 85 N. W. 459; *Merritt v. Great Northern Ry. Co.*, 84 N. W. 321.

When the trial court is of the opinion that a verdict is against a clear preponderance of the evidence, it is its duty to set aside the verdict and order a new trial. It should exercise this discretionary power even though there is a clear conflict of evidence. *Pengilly v. J. I. Case Threshing Mach. Co.*, 11 N. D. 249, 91 N. W. 63; *Gull River Lumber Co. v. Osborne-McMillan Elev. Co.*, 6 N. D. 276, 69 N. W. 691; 14 Enc. Pl. & Pr., p. 770, note 3.

The motion being in the alternative, it is clear that even if the trial court was in error in ordering judgment, a new trial must necessarily follow. *Cruikshank v. St. Paul F. & M. Ins. Co.*, 77 N. W. 958; *Kreatz v. St. Cloud School District*, 81 N. W. 533; *Jones v. Chicago, St. P. M. & O. Ry. Co.*, 83 N. W. 446; *Nelson v. Grondahl*, 12 N. D. 130, 96 N. W. 299.

The action was for money had and received. The plaintiff claims that the defendant received its money from Carter, who embezzled it. The defendant must restore the money unless it received the same in good faith and for value. If the money was received as the result of an illegal transaction, it was not received in good faith for value. *Ervin v. State*, 48 N. E. 249; 2 *Perry on Trusts*, section

828; 1 Perry on Trusts, section 245; Pearce v. Dill, 48 N. E. 788; Pierson v. Fuhrman, 27 Pac. 1015.

George D. Emery, for appellant in reply.

We insist that the weight of the testimony; the credence to be given to it; the fact of "intent" as disclosed by it; the conclusion to be based upon it as to whether or not the contract was a valid one under the instructions given them, were all proper for the jury to consider and determine, and the court, having refused to direct a verdict and the evidence being conflicting, their conclusion cannot now be disturbed. Broad v. Leck, 48 Ill. App. 390; Ream v. Hamilton, 15 Mo. App. 577.

Where the testimony is such that reasonable minds may draw different conclusions from it, the question is eminently one for the jury. Standard L. & A. Co. v. Thornton, 100 Fed. 582; C. & G. W. Ry. Co. v. Price, 97 Fed. 423; Cruikshank v. Bank, 26 Fed. 584; Young v. Ege, 65 N. W. 249.

Where the defendant pleads and gives evidence tending to prove a complete defense, it is error for the court to take the case from the jury. Hamberg v. St. Paul F. & M. Ins. Co., 71 N. W. 388.

A motion for a directed verdict asks the court to decide that there is no evidence to support a contrary contention. If made by the plaintiff and denied, it must be because the court concludes that there is some evidence in support of the claims of the defendant. Then, after such motion and denial, if the defendant moves for a directed verdict in his favor on the ground that there is no evidence to establish the claim of the plaintiff, how does he thereby consent that the court may decide upon the weight of any evidence that may be in the case, whose motion it has just denied? Rogers v. Marriott, 82 N. W. 21; Press et al. v. Duncan, 69 N. W. 543; Cunningham v. Reichart, 72 N. W. 490; New England Mortgage Security Co., v. Great Northern Elevator Co., 71 N. W. 130, 6 N. D. 407.

YOUNG, J. Plaintiff brings this action to recover the sum of \$8,667.71, which it claims its agent, one F. H. Carter, appropriated from its funds and paid to the defendant in a series of gambling transactions. At the close of the testimony both parties moved for a directed verdict. Both motions were denied. The jury returned a verdict for the defendant. Thereafter the plaintiff moved

upon the minutes for the judgment notwithstanding the verdict, or for a new trial. The motion for judgment was granted for the full amount claimed, and the defendant appeals from the judgment.

The defendant assigns error upon the denial of its motion for a directed verdict, and upon the order for judgment for plaintiff. The case turns upon a single question, and that is whether the transactions in which the defendant received the plaintiff's money were legitimate, or were gambling transactions. As to all other facts which are material to plaintiff's right to recover, there is no conflict in the testimony.

The plaintiff is a corporation engaged in the lumber and fuel business, with its home office and principal place of business in the city of Mayville. For a number of years it had a branch office and place of business at the city of Casselton, which was under the charge of F. H. Carter, who, as agent and local manager, transacted all of its business at that point, and had the custody of its funds. The defendant, the Coe Commission Company, which is a Minnesota corporation, has its home office in the city of Minneapolis, and has a large number of branch offices in various cities of the United States. Its ostensible business is buying and selling grain, produce, stocks, and bonds for future delivery. During the times here in question it had an office at the city of Casselton, in charge of one R. S. Sparks. Between the 1st day of March, 1902, and the 1st day of May, 1903, plaintiff's agent, Carter, took from the moneys in his custody various amounts, aggregating in all \$8,667.75, and paid the same to the defendant's agent, Sparks, in settlement of certain alleged purchases and sales of stocks and grain. The plaintiff had no knowledge that Carter was using its funds, or that he was engaged in the transactions in which the money was lost.

The plaintiff's contention is that the evidence shows conclusively that the transactions in which the defendant received its money were gambling transactions. Defendant contends, on the other hand, that they were legitimate trades, or, at least, that the evidence is such that it was for the jury to say whether they were legitimate or were gambling transactions, and that the verdict for the defendant should not therefore be set aside. There is practically no dispute as to the manner in which the defendant conducted its business at Casselton and elsewhere, or as to the particular transactions with plaintiff's agent. The testimony on this point is furnished by Carter and Sparks,

and by one Barry, who was defendant's vice president and head bookkeeper at its home office at the city of Minneapolis, and their testimony differs in no important particular. The defendant's office in Casselton was connected by a private wire with the home office at Minneapolis, and it exhibited on a blackboard in its Casselton office the Chicago and Minneapolis market quotations of grains, produce, stocks, under appropriate headings. Upon the basis of these quotations the customer would give his order to the local agent for an alleged purchase or sale of grain or other commodity for future delivery. The local agent would wire the order to the home office in Minneapolis, and the latter at once (usually from one to five minutes later) wired its acceptance of the trade. The defendant also mailed to its local agent, for delivery to the customer, a written, but unsigned, statement or "confirmation" of each transaction, ostensibly showing what the trade was. This so-called "confirmation" contained the following: "Notice: * * * We hereby agree to receive all property sold to us or through us and to deliver all property bought from us or through us at maturity of contract, and we will not accept business under any other condition, and the trade below recorded is made with this understanding. We also reserve the right to close any trade with us, or through us, without notice, if the money in our hands is in our judgment insufficient to protect the trade. * * *." The defendant's rules required the customer to deposit a margin of \$2 per share on stock, 1 cent per bushel on grain, and 25 cents per barrel on pork, whether the customer purchased or sold. On each sale of grain the customer paid one-eighth of a cent per bushel, which was called "commission." When the sales were closed out on the day of the trade, payments of margins in advance was not usually exacted. When the fluctuations in price exceeded the margin, the customer was required to put up further margins, or his deal was closed out. Settlements were made whenever the customer wished, and were based upon the market quotations upon the blackboard. If the price had advanced, the customer was paid the difference between the quotations when the trade was made and the quotation at the time of the settlement. If the price had fallen, the depreciation was charged against the amount he had put up as margin.

The decisive question in this case is whether the parties intended an actual delivery of the commodities in which they purported to deal. If they did, the transactions were legitimate. If they did not,

they were gambling transactions. The law applicable to such transactions is well settled. "A contract for the sale of goods to be delivered at a future date is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them; but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller, and the price paid by the buyer. If, under the guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void." *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225. See, also, *Dows v. Glaspel*, 4 N. D. 251, 60 N. W. 60, and cases cited.

The only question of difficulty in cases of this character is to determine what the parties really intended; that is, whether at the time the trade was made they intended in good faith to deliver and receive the commodity which was the subject of their alleged sales, or whether they in fact had no such purpose, but, on the contrary, intended to settle upon a basis of difference in market quotations. What are the facts in this case? It stands undisputed that no deliveries were made by or to Carter of any of the commodities which were the subject of his trades, which were probably 500 in number. No deliveries were ever made by or to any of the defendant's customers at Casselton during the two years in which it maintained an office in that city. In each instance, settlement was made by paying or receiving the difference in price at the market quotation at the time of the settlement. As previously stated, the character of such transactions—that is, whether they are legitimate or gambling transactions—depends upon the intention of the parties as to delivery. It is apparent that this intention, when called in question, must be ascertained from the transaction itself, the facts and circumstances attending it, and the defendant's general manner of doing business, including other transactions of a similar nature. This must be true, for it is the general course of one business which classifies it, and "ordinarily men are presumed to intend to do what they do in fact do." *Bryant v. Western Union Telegraph Co.* (C. C.) 17 Fed. 825; *Board v. Kinsey Co.* (C. C.) 125 Fed. 72; *Sharp v. Stalker* (N. J. Ch.) 52 Atl. 1120. Furthermore, it is held, and upon sound reason,

that when the validity of a contract for the future delivery of grain, which has been settled without delivery and by a payment of the difference in market quotations, is involved, and it is made to appear that there was no delivery in numerous other trades, and that deliveries were the exception, and settlements upon the basis of market quotations were the rule, "it is not too much to require a party claiming rights under it to make it satisfactorily and affirmatively appear that the contract was made with an actual view to the delivery and receipt of the grain, and not an evasion of the statute against gaming, or as a cover for a gambling transaction." *Barnard v. Backhouse* (Wis.) 9 N. W. 596; *Sprague v. Warren* (Neb.) 41 N. W. 1113, 3 L. R. A. 679.

Has the defendant made it "satisfactorily and affirmatively" appear that its trades with Carter were "made with an actual view to the delivery and receipt of the grain?" This question must be answered in the negative. In our opinion, the evidence is such that reasonable minds can draw but one conclusion, and that is that no delivery was intended. The fact that 500 trades were made with Carter without a single delivery, and that there were no deliveries in any of the trades made at Casselton during the entire time defendant did business there, would seem to be conclusive upon this question. Further proof, however, to the same effect, and of a most convincing character, is found in the fact that no preparation was made by either buyer or seller to deliver or to receive the property which was the subject of these trades, and in the further fact that the defendant in no instance made inquiry as to the financial standing of its customers, or of their ability to carry out the alleged purchases and sales. The trades were made solely in reliance upon the margin in the defendant's hands, and with a view to a settlement upon a basis of difference in market quotations, and not in reliance upon the customer's ability to deliver the commodity in case of a sale, or pay for it in case of a purchase. It is needless to say that good faith contracts of sale for future delivery are not made in this way. The testimony of Barry, the defendant's vice president, that in 230 trades at other points deliveries were made, raised no issue of fact as to the intent in this case, for it was shown upon his cross-examination that these were the only deliveries made by the defendant in all of its 170 branch offices in more than two years, and out of a total of more than 120,000 trades; in other words, there were 520 settlements upon the difference in market quotations, and with-

out delivery, to one settlement by actual delivery, which shows that delivery was the exception and very rare exception at that, and that settlements on market quotations were the almost universal rule; and there is no evidence to mark the transactions here in question as exceptions. Applying the maxim that "men intend to do what they do in fact do," it shows that no delivery was intended, and this is in entire accord with all the other evidence in the case. The question at issue is the intent of the parties, and upon this the evidence all points in one direction, and conclusively shows that the statement in the "confirmation" that the trade was made with a view to actual delivery was in fact false, and a mere cover for a gambling transaction. The trial court erred, therefore, in denying plaintiff's motion for a directed verdict. This error was properly corrected by granting the motion for judgment notwithstanding the verdict.

Judgment affirmed.

MORGAN, J., concurs. ENGERUD, J., having been of counsel, took no part in the decision of this case.

(102 N. W. 880.)

NOTE.—Judgment notwithstanding the verdict is ordered only when a motion for a directed verdict has been previously made and denied. *Johns v. Ruff*, 12 N. D. 74, 95 N. W. 440.

Judgment non obstante is granted only when it appears from the evidence that the party making the motion is entitled to it as a matter of law upon the merits. *Aetna Indemnity Co. v. Schroeder*, 12 N. D. 110, 95 N. W. 436. Where there is an issue for the jury, judgment non obstante will not be granted. *Nelson v. Grondahl*, 12 N. D. 130, 95 N. W. 299. Failure to unite a motion for new trial with one for judgment non obstante does not waive the former. *Id.* But see *Pine Tree Lumber Co. v. City of Fargo*, 12 N. D. 360, 96 N. W. 357.

On reversal in Supreme Court of a judgment notwithstanding the verdict, the cause will be remanded to the district court, with leave to the respondent to perfect a motion for a new trial, in cases where he has asked for a new trial in connection with the motion for a judgment notwithstanding the verdict. *Nelson v. Grondahl*, 13 N. D. 363, 100 N. W. 1093. To justify a judgment notwithstanding the verdict, the verdict must not only not be justified by the evidence, but it must also appear that there is no reasonable probability that the defects in the proof necessary to support the verdict may be remedied on another trial. *Meeham v. Great Northern Ry. Co.*, 13 N. D. 432, 101 N. W. 183; *Richmire v. Andrews & Gage Elevator Co.*, 11 N. D. 453, 92 N. W. 918.

STATE OF NORTH DAKOTA v. LAWRENCE WISNEWSKI.

Opinion filed March 1, 1905.

Preliminary Examination — Description of Premises in Information for Nuisance.

1. A complaint in justice's court charging a person with keeping and maintaining a nuisance "in a certain one-story frame building" in a certain village and county, without specifying the lot or block where kept, is a sufficient description on which to base a preliminary examination for that offense.

Instructions — Witness Testifying in View of Reward — Province of Jury.

2. A requested instruction that the testimony of a witness having in view a reward in case of conviction shall be received "with distrust" is properly refused, as the question of the credit to be given to a witness is solely for the jury.

Criminal Law — Defendant's Testimony in His Own Behalf — Reading Statute to Jury.

3. It is not error for the trial court to read the statute to the jury, providing that the fact that the defendant did not become a witness in his own behalf shall not be considered by the court or jury in arriving at a verdict.

Excessive Sentence Modified Upon Appeal.

4. Where a sentence pronounced by the district court is excessive in some respects, but not void, the Supreme Court may modify the sentence under section 8350, Rev. Codes 1899.

Appeal from District Court, Walsh county; *Kneeshaw, J.*

Lawrence Wisnewski was convicted of keeping a nuisance, and appeals.

Judgment modified, and, as modified, affirmed.

DePuy & DePuy, for appellant.

The place in which a common nuisance is maintained is of the substance of the charge and must be correctly described, or the complaint affords no basis for a preliminary examination. And an information for an offense for which accused has had no preliminary examination confers no jurisdiction upon the district court. *White v. State*, 44 N. W. 443; *State v. Barnes*, 3 N. D. 131, 54 N. W. 541; *People v. Howland*, 44 Pac. 342; 14 Cent. Dig., c. 643.

There must be some connection between the offense charged in the preliminary complaint and that charged in the information

other than similarity as to character, unless that other offense is disclosed on the examination. *Brown v. State*, 64 N. W. 749; *People v. Russell*, 67 N. W. 1099; *State v. Boutler*, 39 Pac. 883; *People v. Whitney*, 63 N. W. 765; *State v. Barnes*, 3 N. D. 131, 54 N. W. 541; *People v. Parker*, 27 Pac. 537; *People v. Wallace*, 29 Pac. 950; *People v. Oscar*, 63 N. W. 971; *People v. Vierra*, 7 Pac. 640; *State v. Jarrett*, 27 Pac. 146; *People v. Jones*, 24 Mich. 215; *People v. Becketl*, 45 N. W. 582; *People v. Handley*, 52 N. W. 1032; *State v. Emberton*, 45 Mo. App. 56; *City of Galt v. Elder*, 47 Mo. App. 164; *Hanson v. State*, 61 S. W. 120.

The sentence and judgment for a period in excess of six months, as limited by section 7610, are void, at least as to the excessive part. There is a controversy as to whether such a sentence is void in toto or only as to excess. See *In re Taylor*, 64 N. W. 253; 15 Cent. Dig., cc. 319, 1102.

MORGAN, C. J. The defendant was convicted of keeping and maintaining a common nuisance, in violation of the provisions of section 7605, Rev. Codes 1899, and appeals from the judgment of conviction.

The first assignment of error is upon the refusal of the district court to set aside the information upon motion made for that purpose before the defendant pleaded to the same. Such motion was based upon the following facts: The defendant was arrested upon a warrant in justice's court, based upon a complaint alleging that the defendant did on and between certain days keep and maintain a common nuisance in the village of Warsaw, Walsh county, North Dakota, "in a certain one-story frame building." Upon being arrested and brought before the justice, he moved to dismiss the complaint upon the ground that the description of the place where the nuisance was alleged to have been maintained was too indefinite to apprise him of the character of the charge against him, and that such complaint was insufficient as a basis of preliminary examination. In support of the motion he filed his affidavit stating that there were more than six "one-story frame buildings in the village of Warsaw." The motion was denied. Thereafter he waived examination, and the justice held him to answer in the district court to the charge of keeping and maintaining a common nuisance. Upon giving an undertaking for such appearance, he was released from custody. In the district court he made a motion to set aside the information upon the same grounds. The information

specifically alleged that the nuisance was maintained in a place kept on "lot 1 of block 1 * * * of the village of Warsaw." The information in other respects set forth the same facts in relation to the offense charged as did the complaint in justice court. The motion was denied, and a trial followed, resulting in a conviction. It is now urged that the conviction was a nullity, for the reason that the complaint did not specifically allege the place where the nuisance was maintained, and that he was denied a preliminary examination for the offense charged in the information. Section 8348, Rev. Codes 1899, relating to judgments in the Supreme Court, provides that "after hearing the appeal the court must give judgment without regard to technical errors or defects or exceptions which do not affect the substantial rights of the parties." Section 8082, Rev. Codes 1899, provides that an information must be set aside by the district court upon motion when the defendant has not had a preliminary examination when entitled thereto, or has not waived such examination. Section 7982, Rev. Codes 1899, provides that the state's attorney shall file an information against persons accused of crime "when such person or persons have had a preliminary examination before a magistrate for such crime or public offense, and, from the evidence taken thereat, the magistrate has ordered that said person or persons be held to answer to the offense charged or some other crime or public offense disclosed by the evidence," and "when a person accused of a crime or public offense is arrested and waived, in writing, or if before a magistrate, orally, a preliminary examination therefor." Section 7886, Rev. Codes 1899, provides that a complaint must state "the general name of the crime or public offense," and, "if the offense is against the property of any person, a general description of such property." The defendant had a right to a preliminary examination before an information could properly be filed against him by the state's attorney in the district court. The law governing the procedure in preliminary examinations before the committing magistrate, as shown by the sections quoted, does not contemplate that the defendant shall be protected with safeguards to the same extent as on trials. A preliminary examination is not a trial, but the commencement of criminal prosecution. 16 Enc. of Pl. & Pr. 821, and cases cited. The object of the examination is to secure the appearance of the defendant before the district court for further investigation. If a grand jury presents an indictment, or if the state's attor-

ney, on investigation of the evidence bearing on the case, files an information, a trial may follow. The same strictness is not required on a preliminary examination in matters of pleading as is required in framing and construing informations or indictments. The purpose of an examination is accomplished when the defendant appears in the district court. In this case the proceedings before the justice were not void. The justice had jurisdiction of the person and of the offense. The allegations of the complaint would not be sufficient to charge the keeping of a nuisance in an information where an abatement of the nuisance was sought. Where an abatement is sought, the place must be particularly described in the information; but such particularity is not required in a simple criminal prosecution. *State v. Thoemke*, 11 N. D. 386, 92 N. W. 480, and cases cited; section 7614, Rev. Codes 1899.

We are unable to agree with the defendant that he was not accorded a preliminary examination for the offense of keeping and maintaining a nuisance. No evidence was taken, but this was due to the fact that he waived an examination. Having waived an examination, the justice properly held him for appearance in the district court, and the district court thereby acquired jurisdiction. We fail to see that the substantial rights of the defendant were violated. The complaint should be liberally construed. The state's attorney had the right to file an information for the offense attempted to be charged in justice court, although not described with technical accuracy. Section 7983, Rev. Codes '1899; *State v. Rozum*, 8 N. D. 548, 80 N. W. 477; *State v. Fordham*, 13 N. D. 494; 101 N. W. 888. In *State v. Bailey*, 32 Kan. 83, 3 Pac. 769, it was said: "But a preliminary examination is probably also for the purpose of giving to this defendant a reasonable notice of the nature and character of the offense charged against him. * * * But it is not necessary that the papers and proceedings on a preliminary examination should be technically regular and exact like the papers and proceedings on the final trial. It is not necessary that the papers and proceedings on a preliminary examination should set forth the offense in all its details, and with perfect and exhaustive accuracy. * * * All that is necessary is that the defendant should be given a fair opportunity to know by the proffered preliminary examination the general character and outlines of the offense charged against him." We conclude that the complaint in this case was sufficient

under the statute and the principles laid down in the case cited. See, also, *People v. Velarde*, 59 Cal. 458; *People v. Wheeler*, 73 Cal. 252, 14 Pac. 796; *Enc. Pl. & Pr.*, vol 16, p. 843, and cases cited.

It is claimed that the refusal to give the following instruction was prejudicial error: "I charge you that when persons like Martin Hanson, the agent of the enforcement league, and whose pecuniary reward for his services depends largely on the success of the prosecution, are employed, or employ themselves, to procure evidence to establish any fact, all that they do or say must be weighed with great care and vigilance, and you should receive his testimony with caution and distrust." The instruction is objectionable. It tells the jury, in effect, what weight they shall attach to such testimony. While not informing the jury not to consider it, it tells them to distrust it. The weight of such testimony and of all testimony is exclusively for the jury. It would be proper to say to the jury that it was their duty to determine whether the fact that the witness expected a reward in case of conviction affected the truthfulness of his testimony. But the instruction asked for went further than that. *Commonwealth v. Pease*, 137 Mass. 576; *People v. Seaman* (Mich.) 65 N. W. 203, 61 Am. St. Rep. 326. The court instructed the jury that "the defendant shall at his own request and not otherwise, be deemed a competent witness; but his neglect or refusal to testify shall not create or raise any presumption of guilt against him, nor shall such neglect or refusal be referred to by any attorney prosecuting the case, or considered by the court or jury before whom the trial takes place. Therefore, under the law, the mere fact that the defendant has not testified in this case shall not create any presumption of guilt in your minds against the defendant, and should not be considered by you in this case." This instruction was given in the precise language of section 8191, Rev. Codes 1899. The contention is that the court committed prejudicial error by reading the statute to the jury. The statute does not prohibit the court from mentioning to the jury the fact that the defendant has a right not to become a witness in the case, and it seems that no possible prejudice could follow from that fact when they were instructed that such fact should not be considered by them in their deliberations. It was an instruction favorable to the defendant. The state's attorney is prohibited to refer to it or mention it. A defendant's failure to become

a witness might well be considered as a circumstance unfavorable to the defendant, and to advise them it shall not be so considered is not subject of prejudice or exception. Enc. Pl. & Pr., vol. 11, p. 352; *State v. Weems*, 96 Iowa, 448, 65 N. W. 387; *Fulcher v. State*, 28 Tex. App. 465, 13 S. W. 750; *State v. Landry*, 85 Me. 95, 26 Atl. 998.

The trial court sentenced the defendant to imprisonment for ninety days in the county jail and to pay a fine of \$400, and in case of his failure to pay such fine that he should be imprisoned in the county jail for 200 days additional to the ninety days. The statute limits imprisonment by reason of the nonpayment of the fine to six months additional imprisonment. Section 7610, Rev. Codes 1899. The sentence of imprisonment by reason of the nonpayment of the fine is excessive to the extent of twenty days. It is claimed that this nullifies the sentence so far as imprisonment on account of the nonpayment of the fine is concerned. But we do not concur in that contention. Section 8350, Rev. Codes 1899, provides that "the Supreme Court may reverse, affirm or modify the judgment or order appealed from, and may set aside, affirm or modify any or all the proceedings subsequent to or dependent upon such judgment or order, and may if proper order a new trial." In this case the conviction was regular, but the sentence exceeded the limit prescribed by law in one particular, and was void as to the excessive part. Whether the case should be remanded, with directions to modify the sentence, or whether this court should modify it, presents a question of practice not hitherto decided by this court in a criminal case. Under the section cited it seems clear that this court is vested with the power to modify sentences in such a case. It is true that the power would not be exercised in a case covering a discretion in the district court as to sentence to be pronounced and the judgment of the district court had not been indicated as to the punishment. The court having fined the defendant in the sum of \$400, and adjudged that he be imprisoned for 200 days, and if such fine was not paid it is clear that the additional sentence of imprisonment would have been made six months if the provisions of the statute had not been overlooked. The courts generally hold that a modification of the sentence in such cases as this is the proper practice in Supreme Courts under statutes like the one quoted. *Routt v. State*, 61 Ark. 594, 34 S. W. 262; *Harris v. People*, 59 N.

Y. 599; State v. Taylor, 7 S. D. 533, 64 N. W. 548; Mims v. State, 26 Minn. 494, 5 N. W. 369.

The judgment is modified by reducing the additional imprisonment to the period of six months, and, as modified, is affirmed. All concur.

(102 N. W. 883.)

STATE OF NORTH DAKOTA V. CHARLES CURRIE.

Opinion filed March 6, 1905.

Presence and Co-operation of a Detective in Burglary No Defense to Criminal.

1. Upon the trial of one charged with burglary, the mere fact that one who was present with and assisted him in the burglary was a detective is not a defense, if the detective did not instigate the crime, and it was committed as to every ingredient of it by the criminal.

Passive Consent to a Burglary by Owner of Building for the Purpose of Detection Is no Defense to Burglar.

2. Where a detective disclosed to the owner of the building that it was probably about to be burglarized by a person named, with the feigned assistance of himself, acting for the purpose of securing evidence of the intended burglary and other crimes, the fact that the owner did not take steps to prevent the burglary, but passively allowed it to go on, is not a consent to the burglary that will be a defense to the burglar.

Where the Accused Commits the Offense in All Its Elements, He Is Guilty Notwithstanding Complicity of Detective.

3. Where a detective apparently assists in a burglary for the purpose of securing evidence of the same and other offenses, the acts of the detective are not to be imputed to the criminal, as they are not acting in a common purpose. Nevertheless, if the offense is committed by the person charged as to every element thereof, he may be found guilty, notwithstanding the complicity of the detective.

Instructions — Failure of Prisoner to Testify.

4. An instruction by the court that the jury must not consider the failure of the defendant to become a witness in his own behalf in arriving at a verdict is not erroneous.

Appeal from District Court, Walsh county; *Kneeshaw*, J.
Charles Currie was convicted of burglary, and appeals.
Affirmed.

DePuy & DePuy, for appellant.

A confession must not be obtained from the accused by any direct or implied promise on the part of officials concerned in his prosecution. 3 Am. & Eng. Enc. of Law, 499, 464; 14 Cent. Dig. section 1175.

A subsequent confession following a previous one, made under the influence of promises of favor, is inadmissible, if such previous promises continue their influence on defendant's mind at the time of the examination. In re Bowerhan, 4 City H. R. 136; 14 Cent. Dig. c. 1857; Robinson v. People, 42 N. E. 375. Such second confession must be excluded if there is any doubt of the expurgation of such influence. Walker v. State, 7 Tex. App. 245, 32 Am. Rep. 595; Gallagher v. State, 24 S. W. 288; Clayton v. State, 21 S. W. 255.

If an alleged burglary be instigated by a private detective with the approval of the proprietor of the place alleged to be burglarized, then the defendant is not criminally liable. People v. McCord, 42 N. W. 1106; Love v. People, 43 N. E. 710; 8 Cent. Dig. c. 1567.

If the detective pretending to the defendant to be his accomplice, made the actual breaking with the proprietor's consent, no crime was committed, even though the defendant assisted and may have thought that he himself prompted them. Williams v. State, 55 Ga. 394; 32 Cent. Dig. 1495; 1 Bishop on Crim. Law (2d Ed.) sections 344, 345; State v. Douglass, 26 Pac. 476. If the detective led and the defendant followed, and the former had the consent of the owner, the defendant was not guilty, and his intent and belief are immaterial. Speilden v. State, 30 Am. Rep. 126; Williams v. State, 55 Ga. 391; State v. Adams, 20 S. E. 722.

The law looks with suspicion upon the testimony of a detective employing falsehood and encouraging the commission of a crime to gain his ends, and the jury should be specially instructed that his testimony should be received with caution. 29 Am. & Eng. Enc. of Law, 776-7-8.

An instruction unrequested by the defendant, that "under the law, the mere fact that the defendant has not testified in this case shall not create any presumption of guilt," violates the spirit of the law "that he shall at his own request and not otherwise be deemed a competent witness," and his neglect or refusal to testify shall not be referred to by any attorney prosecuting the case or considered

by the court." *State v. Robinson*, 117 Mo. 663; 29 Am. & Eng. Enc. of Law, 681.

To instruct that the prisoner can be guilty of only the higher offense, when the jury might convict of a lesser, is fatal error. *Hagan v. State*, 10 Oh. St. 459; 14 Cent. Dig. c. 2727; *State v. Duffy*, 100 N. W. 796.

MORGAN, C. J. The defendant was convicted of the crime of burglary in the third degree, and sentenced to five years in the penitentiary. His principal contention on the appeal is that the court erred in refusing to give certain requested instructions bearing on the relation of the owner of the building, and of a certain detective, to the commission of the alleged crime. His claim is that the owner of the building consented to the burglary, and that defendant was instigated to commit the burglary under the undue influence of the detective in causing him to become intoxicated.

The facts are uncontradicted in respect to what transpired before the burglary, and are as follows: About January, 1904, several crimes, including burglaries, larcenies and arson were committed in Minto, Walsh county, N. D., without any success by the local authorities in arresting the perpetrators and bringing them to trial. Thereupon the county authorities sought the aid of one Walker, a detective from St. Paul. The detective had an interview with the state's attorney upon his arrival in the county, and secured from him the names of the persons suspected of complicity in the past crimes, among them being the name of the defendant. The detective thereupon acted as cook in a restaurant in Minto. This restaurant was kept in connection with a place kept by one Gile, where intoxicating liquors were unlawfully sold. The restaurant feature of the establishment was a pretense, as a matter of fact, and was resorted to for the purpose of giving to the detective the appearance of having employment at the place. After some days the defendant and Walker became acquainted, and soon became constant companions. They ate together, slept together, drank to excess together, and became confidential with each other and intimate in their relations. The detective loaned the defendant small sums of money at one time, and in conversation about money matters the detective told the defendant that he had \$65 coming from Canada. The defendant then stated to Walker that he knew where "we could get some money," and, upon being asked where, answered, "in some of these stores around here." The defendant and

Walker finally, and after much consideration of the time and place of burglary, concluded to break into a store. The detective says in respect to the final conclusion: "We arranged a deal to break this store open." The first suggestion of a burglary, as between the defendant and Walker, came from the defendant. Several stores were suggested by the defendant as ones that might be burglarized, and among them Zulesdorff's, the one that was broken into. Before the store to be burglarized was agreed upon, Walker secured a letter of introduction to the mayor of Minto from the state's attorney. Walker presented the letter to the mayor, and told him of the contemplated burglary, and further stated: "I told him what I was there for, and told him about the stores, this building to be broken open, and told him that I didn't want myself in some place where I might get shot, * * * and told the doctor, if he knew any storekeeper in town there that would keep a secret, he had better go and notify him, and afterwards I would see him." Dr. Evans, the mayor, suggested that Zulesdorff's store be selected, and saw Zulesdorff in pursuance of this request, and Zulesdorff sent Walker word that he wished to see him. Walker saw Zulesdorff thereafter, and testifies as to what transpired between them as follows: "And he said that he had seen Dr. Evans, and he said that things would be all right; and I told him that after it was broken into he was to keep still about it, and told him what I wanted to know on the outside; and I said, 'By doing that I can get in a little work, and can find out the rest of these people;' so that was about all that was said between I and Frank Zulesdorff." Later, he testified as follows upon his further cross-examination: "Q. And Zulesdorff told you it would be all right? A. Yes, sir. Q. And that he would permit you to use his store in your plans, and would keep the matter a secret for a sufficient length of time to enable you to complete the job? A. Yes, sir." Zulesdorff did nothing further in reference to the burglary, except that he marked two \$5 bills that he left in the money drawer with other money on the Saturday night preceding the burglary, which was committed on Sunday night. The doors and safe and money drawers were locked, and left in the same manner as usual. He marked the bills so that he could identify them in case they were stolen. On these facts it is claimed that Zulesdorff consented to the breaking, and that the defendant cannot, in consequence of such consent, be rightfully convicted of the crime of burglary.

After a conversation between Zulesdorff and Dr. Evans and Walker, it was definitely decided by defendant and Walker that the Zulesdorff store was the one to be burglarized. Walker says that he never made any suggestions to the defendant as to the burglary; that he simply acquiesced and agreed to defendant's plans. In answer to a question as to "why you didn't go on with your plans, then, everything being all right," he testifies: "Yes, sir, right enough if I had wanted to work the plan myself, but I didn't want to do that. I wanted him to do it himself, if he wanted to do it." Walker and defendant agreed to break into the store Saturday night, and went to the store for that purpose, but something happened after they got to the store, causing the breaking to be abandoned on defendant's request. He then said, however, "We will try it tomorrow night." On Sunday night they again went to the store, and broke into it by joint force. The defendant removed the marked bills and other money from the money drawer, and a fur-lined coat was also taken from the store by defendant, and they left the building together. After leaving the building the money, \$16.60, was equally divided between them. The overcoat was hidden in a livery barn by the defendant, and subsequently found by an officer and returned to the owner. In a few days the defendant was arrested at the instance of one Gile, and his trial and conviction followed.

Upon these facts, two questions are presented for consideration which were raised at the trial by requests to instruct the jury, and they were also urged on a motion for a new trial: (1) Did the owner of the property consent to the breaking into of his building by the defendant? (2) Did the fact of the detective Walker's participation in the burglary entitle the defendant to a reversal of the judgment of conviction?

Upon the first question, the facts as narrated show that Zulesdorff did nothing by any act to aid in the burglary of his building. He remained passive after being informed of the intended burglary. The plan of a burglary had been arranged before he was advised of the plan of the detective to join the defendant in the proposed burglary as a feigned participant. Zulesdorff gave the detective no instructions. He did not advise him as to the manner of proceeding, nor do anything to assist in the burglary. The store was closed and locked in the usual manner. When he consented to remain away, at the request of the detective, for the

purpose of securing evidence, it was not certain that his store was the one to be burglarized, nor when it was to occur. The Zulesdorff store was selected as the one to be burglarized after the detective's interview with him. Under these conditions it cannot be said that he consented to the burglary. Before the owner's consent will be a defense to a burglary, the owner must participate, or in some way aid or solicit or encourage the burglary. Mere knowledge that a person's property is to be burglarized, followed by nonaction on his part to thwart it, is not deemed a consent to it. His consent must be manifested by some act of assistance. Mere passiveness for the purpose of securing evidence of the burglary is not such consent as can be urged by the burglar as a defense. The detective was not the agent of Zulesdorff in the matter at all, nor did he have charge of the building in any sense, hence the detective's acts cannot be said to be those of the owner. In *People v. Hanselman*, 76 Cal. 460, 18 Pac. 425, 9 Am. St. Rep. 238, the court said: "And under the authorities we do not think that there is such consent where there is mere passive submission on the part of the owner of the goods taken, and no indication that he wishes them taken, and no knowledge by the taker that he wishes them taken, and no mutual understanding between the two, and no active measures of inducement employed for the purpose of leading into temptation, and no preconcert whatever between the thief and the owner." In *State v. Sneff*, 22 Neb. 481, 35 N. W. 219, the court said: "The fact that those in charge of a building hear of an intended burglary to be committed by breaking into the building do not prevent it, but put in a force in the building to capture the burglar, and he is so captured, does not affect the guilt of the burglar." In a similar case to this, in *State v. Jansen*, 22 Kan. 498, in speaking of the conduct of the owner of the building, the court said: "His willingness to assist in and facilitate the detection and arrest of a criminal was no consent to the commission of the crime." In *McAdams v. State*, 8 Lea (Tenn.) 456, the court said: "A man may direct his servant or a third person to appear to encourage the design of a thief and lead him on until the offense is complete, so long as he does not induce the original intent, but merely provides for its discovery after it has been formed." See, also, *Thompson v. State*, 18 Ind. 386, 81 Am. Dec. 364; *Clark on Criminal Law*, p. 11; *Varner v. State*, 72 Ga. 745; *State v. Stickney*, 53 Kan. 308, 36 Pac. 714, 42 Am. St. Rep. 284; *State*

v. Adams, 115 N. C. 775, 20 S. E. 722; 6 Cyc. p. 182, and cases cited.

Upon the second question, the state's evidence shows that the detective did not instigate the commission of the offense. The suggestion of committing the crime, and the active planning of it, is shown to have come from the defendant. The detective fell in and agreed with the defendant's plan. It is true the detective deceived the defendant as to the purpose of his complicity in the crime. He assisted by his acts, but with a hidden purpose. Without commending this practice, or commenting upon it as dangerous and generally of doubtful propriety, we will say that, if the defendant is shown to have committed the crime in its completeness, the feigned complicity of a detective in the crime should not be a shield to the defendant. The authorities almost unanimously hold that a detective may aid in the commission of the offense in conjunction with a criminal, and that the fact will not exonerate the guilty party. Mere deception by the detective will not shield the defendant, if the offense be committed by him free from the influence or instigation of the detective. The detective must not prompt or urge or lead in the commission of the offense. The defendant must act freely of his own motion, and, if he so acts, the fact that the detective was not an accomplice in fact will not accrue to his benefit. The defendant is not to be charged with what was done by the detective, as the two are not acting together for a common purpose. As was said by the court in *State v. Jansen*, *supra*: "The act of a detective may, perhaps, not be imputable to the defendant, as there is a want of a community of motive. But where each of the overt acts going to make up the crime charged is personally done by the defendant, and with criminal intent, his guilt is complete, no matter what motives may prompt or what acts be done by the party who is with and apparently assisting him." The cases cited above are all to the effect that the assistance of a detective in a burglary is no defense to a person who himself does every act essential to constitute the burglary.

The defendant did not testify at the trial, hence the facts as to what transpired between him and Walker at and before the burglary are all to be gathered from Walker's testimony. From this testimony, carefully scrutinized, there is no support, even by inference from the facts stated, for the contention that Walker instigated the crime, hence the proposed requests on the question of the insti-

gation of the crime by him were properly refused as not applicable to the case under any theory or hypothesis to be drawn therefrom. The court gave the jury correct instructions on the question of consent. They were told that mere knowledge by the owner that the building was to be burglarized, without taking steps to prevent the same, would not be a consent to the commission of the offense. They were also instructed that, if the building was burglarized by the "procurement and consent" of the owner, the defendant would not be guilty. The jury were properly instructed on the effect of the intoxication of the defendant. Under such instructions the jury should have acquitted the defendant if the facts warranted a finding of intoxication as defined in the instructions. The evidence, in our judgment, would not warrant a finding that he was intoxicated at all when the crime was committed.

Complaint is made on the ruling of the court in admitting admissions in the nature of a confession made by the defendant in the presence of the state's attorney and others soon after the offense was committed. The ground of complaint is that such confession was made under the inducement of a promise made by the detective. The detective told the defendant while in jail after his arrest that "in order to help himself out" he had better tell who the parties were that were implicated in the crimes that had previously been committed in Minto. There was nothing said by him at this time as to the commission of the offense for which he was tried, and what was there said by defendant was not admitted in evidence. In the conversation or presence of the state's attorney, the defendant admitted having assisted in burglarizing the Zulesdorff store. At this time defendant knew that Walker was a detective. But there was no promise made, and there is no ground for any claim that the admission was not voluntarily made, and without any suggestion even of any benefit to be gained by him by such admission. The admission was admissible. *People v. Willet*, 27 Hun, 469.

The court read to the jury the section of the Code relating to persons on trial for offenses not becoming witnesses for themselves, and the effect thereof, and that the jury should not consider that fact in making up their verdict. We have recently held that giving such instruction is not error. *State v. Wisnewski*, 13 N. D. 649, 102 N. W. 883.

Exceptions were saved to the introduction and to the exclusion of certain evidence. We have carefully considered these exceptions, and find them without merit. One of these exceptions relates to excluded evidence of the defendant's condition as to sobriety when he was arrested two days after the burglary. Another relates to the ownership of the livery barn where the overcoat was hidden, and that the owner was defendant's father. Other assignments of error in refusing requests have been carefully considered, and found not prejudicial error, but properly refused. The evidence amply sustains the verdict, and the trial was without prejudicial error.

The judgment is affirmed. All concur.
(102 N. W. 875.)

STATE OF NORTH DAKOTA v. WILLIAM GERHART.

Opinion filed March 6, 1905.

Criminal Law — Appeal — Record.

This court cannot review alleged errors of the trial court in the absence of a proper and sufficient record of the facts upon which the trial court acted in making the orders and rulings complained of.

Appeal from District Court, Bottineau county; *Palda, J.*

William Gerhart was convicted of selling intoxicating liquors, and appeals.

Affirmed.

V. B. Noble, E. B. Goss, H. S. Blood, and G. A. Bangs, for appellant.

A. G. Burr, State's Attorney, for respondent.

YOUNG, J. The defendant was tried and convicted in the district court of Bottineau county of the crime of selling intoxicating liquors. The abstract upon which his appeal is submitted does not present the facts upon which the trial court acted in making the rulings and order upon which he relies for a reversal, and for this reason we are not able to consider them. It is found upon an examination of the transcript returned by the clerk of the district court that the record itself is likewise insufficient. The abstract cannot, therefore, be cured by amendment. The defendant was indicted by the same grand jury and tried at the same term of

court as the defendant in the case of *State v. Scholfield*, 102 N. W. 878, in which the opinion has just been handed down. The record in this case is in all substantial respects in the same condition and has the same fatal defects as the record in that case, and there has been the same delay in the presentation and prosecution of the appeal. It follows, for the reasons pointed out in that case, that a hearing cannot be had upon the merits.

The judgment is affirmed. All concur.

(102 N. W. 880.)

STATE OF NORTH DAKOTA V. ROBERT A. SCHOLFIELD.

Opinion filed March 6, 1905.

One Who Urges Error Must Present a Record of the Facts Upon Which the Court Acted, or Review Cannot Be Had.

1. It is a well-settled rule of appellate procedure, applicable to criminal as well as civil cases, that one who would urge error must prepare and present a record of the facts upon which the trial court acted in making the ruling complained of, and in case of a failure to do so a review cannot be had.

Facts Essential to a Review, Not Otherwise Appearing in the Record, Must Be Brought in by a Statement of the Case.

2. Facts which are essential to a review of errors, and are not otherwise made a part of the record, must be brought into it by a statement of the case.

Where the Facts Are Extrinsic to the Record Proper, and Do Not Appear in the Statement of the Case, Errors Based Thereon Are Not Reviewable.

3. It appears from the abstract in this case that the facts upon which the several errors assigned rest are in whole or in part extrinsic to the record proper, and that they have not been brought into the record by a statement of the case. It is *held*, therefore, that the errors are not reviewable.

Upon Facts Stated in Opinion, Further Delay to Prepare Record Would Be an Abuse of Discretion.

4. It is *held*, after an examination of the transcript returned by the clerk of the district court, that the abstract cannot be cured by amendment, and, upon the facts stated in the opinion, that it would be an abuse of discretion to permit further delay for the purpose of preparing and presenting a proper and sufficient record.

Appeal from District Court, Bottineau county; *Palda*, J.

Robert A. Scholfield was convicted of maintaining a common nuisance, and appeals.

Affirmed.

V. B. Noble, E. B. Goss, H. S. Blood, and G. A. Bangs, for appellant.

A. G. Burr, State's Attorney, for respondent.

YOUNG, J. On June 21, 1902, an indictment was filed in the district court of Bottineau county charging the defendant with the crime of keeping and maintaining a common nuisance. The trial, which occurred on June 13, 1903, resulted in a verdict of guilty, and on July 7th thereafter the defendant was sentenced to ninety days imprisonment in the county jail and to pay a fine of \$300, together with the costs of the prosecution, taxed at \$50, and in default of payment of said fine and costs to serve an additional period of three months. The defendant has appealed from the judgment after taking steps to supersede its execution.

The errors subjoined to appellant's brief and urged as grounds for reversal are stated as follows: "(1) The court erred in overruling the motion to dismiss for failure to prosecute. (2) The court erred in overruling the motion to set aside the indictment. (3) The court erred in refusing to set aside the verdict by reason of the insufficiency of the evidence and in overruling the motion to advise the jury to acquit." There are three further assignments, each of which is directed to the instruction to the jury.

The condition of the record is such that we are unable to review any of the questions presented by the assignments. The appellant has failed to prepare and present a record which will authorize a consideration of any of the errors which he claims were committed by the trial court. It is a well-settled rule of appellate procedure, applicable to criminal as well as civil cases, that one who would urge error must present a record of the facts upon which the trial court acted in making the ruling or order complained of, and in case of failure to do so a review cannot be had. "The burden is always upon an appellant to establish error, and it is necessary for him to embody in his abstract such portion of the record as will establish the facts necessary to sustain his contention." *Ashe v. Beasley*, 6 N. D. 192, 69 N. W. 188. It is also well settled that "all matters which do not constitute a part of the record proper at common law or by statute must be brought in by a bill of exceptions

or its equivalent as a statement of facts." 2 Enc. Pl. & Pr. 268, and cases cited. Also, *McMillan v. Conat*, 11 N. D. 256, 91 N. W. 67, and *Davis v. Dinnie*, 13 N. D. 430, 101 N. W. 314, and cases cited. This object is accomplished under our statute by the settlement and filing of a statement of the case. See sections 8256, 8257, Rev. Codes 1899. The facts in whole or in part which are essential to a review of the errors urged in this case do not appear upon the record proper, and the abstract does not show that they were brought into the record by a statement of the case. The motion to dismiss for failure to prosecute, which is set out in full in the abstract, was made in part upon facts extrinsic to the record proper, and they have not been brought into the record. This is also true as to the motion to set aside the indictment. This motion was based upon certain alleged irregularities on the part of the county commissioners in preparing the jury list and the method pursued in supplying additional jurors to complete the panel of the grand jury; in short, upon facts not contained in the record proper.

That the third assignment cannot be reviewed in the absence of a statement is apparent from the mere recital of the errors sought to be reviewed. The instructions to the jury, which were oral, and were afterwards extended by the stenographer, and filed, some time after the trial was closed, with the clerk are set out in the abstract. They are not signed by the trial judge, or otherwise identified by him. Sections 8269, 8297, Rev. Codes 1899, provide that a copy of oral instructions written out by the stenographer and filed with the clerk shall constitute a part of the record of the action. Whether instructions given orally become a part of the record by the mere act of the stenographer in extending and filing them with the clerk, and in the absence of the signature of the trial judge or other indentionation by him, is open to question. Under a statute somewhat similar (section 1176, Deering Code 1886, vol. 4) it was held by the Supreme Court of California in a series of cases that instructions inserted in the record by the clerk without the indorsement of the court, and not settled in a statement of the case, cannot be considered. See *People v. Flahave*, 58 Cal. 249; *People v. January*, 77 Cal. 179, 19 Pac. 258. It is not necessary for us to decide this question at this time for the reason that the defendant's exceptions to the instructions which the abstract recites were subsequently filed with the clerk are not a part of the

record. The statute (section 8178) authorizes the filing of exceptions to oral instructions within twenty days after a copy of the same has been filed with the clerk, but exceptions so filed are not made a part of the record of the case. See section 8297. And it is apparent that they can become a part of the record only through a statement of the case. The defendant having failed to bring his exceptions into the record, they cannot, therefore, be considered.

The abstract also contains a motion for new trial. The motion was made upon the minutes, and the motion did not specify particularly or at all the errors relied upon, as required by section 8273, Rev. Codes 1899, and no error can therefore be predicated upon it. The absence of a statement is also fatal.

Furthermore, the defects which thus appear upon the face of the abstract and preclude a review of the errors urged by the appellant are not such as can be cured by an amendment of it. We have carefully examined the mass of miscellaneous papers embodied in the transcript returned to this court by the clerk of the district court, and find that it contains no statement of the case which can serve as a basis for reviewing any of the errors relied upon. Among other papers foreign to the record proper, it contains a transcript of the testimony taken at the trial. Also a transcript of the testimony taken upon the motion to set aside the indictment. It also contains a four-page document, which is styled a "statement of the case," and a further document, consisting of eight pages, which is termed an "amended statement of the case." These so-called statements are not settled or certified to by the trial judge, and this is also true of the two transcripts. The only document which bears the signature of the trial judge consists of four pages, upon which appear excerpts from the testimony of six witnesses. He certifies that this "is a true and correct statement of the proceedings had before me in the trial, * * * which do not appear of record." It is entirely clear that this statement is not sufficient, either in form or substance, to authorize a review of any of the errors urged upon this appeal. It purports to be no more than a partial record. It contains no specification of errors, as required by section 8273, Rev. Codes 1899, and does not, therefore, present the questions involved in the motion for a new trial, and it embodies no facts relating to the other errors assigned upon this appeal. The record itself being thus defective, it is apparent that the abstract cannot be cured by amendment; and to permit the record to be sent down to the end that a proper

and sufficient record may be prepared would, in view of the defendant's delay in taking, preparing and presenting his appeal to this court, be an abuse of discretion. The record shows that the defendant was sentenced on July 7, 1903. His notice of appeal was not served for almost one year thereafter, to wit, June 30, 1904. The abortive statement which is in the record was not settled until September 27, 1904. On September 24, 1904, the state's attorney served notice upon the defendant to send up the record, and later because of the defendant's default, moved to dismiss the appeal. This motion was granted, but later, by an order dated October 10, 1904, this court reinstated the appeal, and imposed as a condition to the hearing a requirement that the defendant transmit the record and file his abstract and brief on or before November 14, 1904. At the last-named date a further indulgence was granted to the defendant to the end that the case might be heard and decided upon its merits. Under these circumstances it would be an abuse of discretion to further suspend the execution of the judgment.

Judgment affirmed. All concur.
(102 N. W. 878.)

INDEX

ABATEMENT OF ACTION. See ACTION, 58; INTOXICATING LIQUORS, 122.

ACCEPTANCE. See CONTRACTS, 157.

1. Acceptance is effected by mailing a letter containing it for transmission to the person giving the order. *Reeves & Co. v. Bruening*, 157.

ACKNOWLEDGMENT. See HUSBAND AND WIFE, 167.

1. Attaching a false certificate of acknowledgment to an instrument after its execution, is not a material alteration. *Canfield v. Orange*, 622.

ACTION. See CREDITORS, 396; EQUITY, 467; ESTOPPEL, 502; EXECUTORS AND ADMINISTRATORS, 513.

1. Action to enjoin a liquor nuisance abates upon the death of defendant. *State v. McMaster*, 58.
2. An action to abate a liquor nuisance is a public one and does not survive against the personal representative of a deceased defendant, but abates upon his death. *State v. McMaster*, 58.
3. Where an action is abated by the death of a principal defendant, the cause of which does not survive, a judgment cannot be rendered for the destruction or closing of property as a liquor nuisance, as such remedies are incidental to the main remedy, the abatement of the nuisance, which was abated by the defendant's death. *State v. McMaster*, 58.
4. There is no proceeding in rem alone against intoxicating liquors authorized under the prohibition law, and they can be destroyed only in an action against the owner or keeper guilty of unlawfully keeping or using such liquors. *State v. McMaster*, 58.
5. A creditor whose claim has not been reduced to judgment may maintain an action against an insolvent corporation for himself and other creditors to enforce a stockholders' liability under section 2902, Rev. Codes 1899. Sections 5767-5770 authorize it. *Marshall-Wells Hardware Co. v. New Era Coal Co.*, 396.

ADMISSIONS. See EVIDENCE, 629.

ADVERSE CLAIMS. See EVIDENCE, 411.

1. In ejectment, or action to determine adverse claims under the statute, plaintiff must recover upon the strength of his own, not the weakness of defendant's, title. *Conrad v. Adler*, 199.

AFFIDAVIT. See **INJUNCTION**, 84; **CHANGE OF VENUE**, 112; **SUMMONS**, 305; **PRACTICE**, 344; **TAXATION**, 467; **SLANDER AND LIBEL**, 525.

1. An affidavit for continuance on the ground of the absence of a material witness, which states that the affiant is informed and believes that the absent witness can and will testify to certain facts, but fails to disclose the sources of information or grounds for belief, is insufficient. *State v. Carroll*, 383.

AGENT. See **PRINCIPAL AND AGENT**, 12, 157.

ALIENATION OF AFFECTIONS. See **HUSBAND AND WIFE**, 85.

ALTERATION OF INSTRUMENTS.

1. Attaching a false certificate of acknowledgment to the paper upon which the contract was written, and the signing of the agreement by the plaintiff and a witness, all done without defendant's knowledge, sometime after its execution by him, are not material alterations. *Canfield v. Orange*, 622.

AMENDMENT. See **APPEAL AND ERROR**, 182; **PLEADING**, 199.

ANSWER. See **PLEADINGS**, 516.

APPEALABLE ORDER. See **APPEAL AND ERROR**, 112, 387, 577.

APPEAL AND ERROR. See **MANDAMUS**, 211.

1. On appeal under section 5630, Rev. Codes 1899, case will be heard in the Supreme Court on same theory upon which it was tried in the district court. *Fifer v. Fifer*, 20.
2. Payment of a judgment and acceptance of a satisfaction thereof, without reservation of the right to appeal, waives such right. *Signor v. Clark*, 35.
3. Payment of a judgment under coercion and duress, does not waive the right to appeal therefrom. *Signor v. Clark*, 35.
4. Service of notice of appeal upon attorney, who appeared for a party in the district court, is sufficient. *Bank v. Pick*, 74.
5. Service on a firm of attorneys, one of whom is the attorney of record in the trial court, is sufficient. *Bank v. Pick*, 74.
6. Service of notice of appeal upon the clerk of the District Court is unnecessary. *Bank v. Pick*, 74.
7. It is not necessary to file the notice of appeal with the clerk of the district court from which the appeal is taken before service thereof; and a delay of ten days after such service will not defeat the appeal, if all other necessary acts are done within the time for perfecting such appeal. *Bank v. Pick*, 74.

APPEAL AND ERROR—Continued.

8. An appeal from an order taken within the period allowed by law may be had after time to appeal from a judgment has expired. *King v. Hanson*, 85.
9. Section 5605, Rev. Codes 1899, grants a full period of sixty days after notice of the entry thereof in which to appeal therefrom. The additional time given in said section applies only to orders where a settlement of a statement of the case is required. *King v. Hanson*, 85.
10. An order punishing an attorney for contempt, made during a trial, is an independent order and appealable by the party aggrieved. But where the client of such attorney wishes to urge such action of the court "as an irregularity in the proceedings of the court preventing defendant from having a fair trial," the application "must be upon affidavit," under section 5473, Rev. Codes 1899. *King v. Hanson*, 85.
11. An order granting a change of venue is an appealable order. *Robertson Lumber Co. v. Jones*, 113.
12. Section 5630, Rev. Codes 1899, which governs the trial of actions tried to the court without a jury, gives the appellants the right to specify questions of fact for review upon appeal, but not the respondent. *Salemonson v. Thompson*, 182.
13. A question of fact specified for review in this court under section 5630, Rev. Codes 1899, must be sufficiently definite to enable the respondent to determine, for purposes of amendment, what evidence should be included in the statement of case. *Salemonson v. Thompson*, 182.
14. In cases not triable de novo on appeal, neither errors of law occurring at the trial nor the insufficiency of the evidence to sustain the findings can be considered by the Supreme Court without specifications of error embodied in a statement of the case. *Barnum v. Gorham Land Co.*, 359.
15. An order of the district court dismissing an appeal from a justice court judgment is not appealable. *Lough v. White*, 387.
16. Reversible error cannot be predicated upon the admission of incompetent evidence of a fact which is otherwise conclusively established and is not controverted upon the trial. *Cairncross v. Omlie*, 387.
17. On appeal by one of several defendants, this court will not notice alleged errors which do not affect the appellant. *Halloran v. Holmes*, 412.
18. Upon an appeal from an order granting a new trial, the question is not whether the trial judge was warranted in granting it upon a particular ground referred to in the order, but whether, upon the whole record, and upon any of the grounds urged, it should have been granted. *Davis v. Jacobson*, 430.
19. An order denying a motion to vacate an injunctive order is not appealable. *Tracy v. Scott*, 577.

APPEAL AND ERROR—Continued.

20. Under section 8350, Rev. Codes 1899, the Supreme Court may modify an excessive sentence upon appeal. *State v. Wisnewski*, 649.
21. The Supreme Court cannot review alleged errors of the trial court in the absence of a record showing the facts upon which orders and rulings complained of were made. *State v. Gerhart*, 663.
22. One who urges error must present a record of the facts upon which the court acted, or a review cannot be had. *State v. Scholfield*, 664.
23. Facts essential to a review of errors, not otherwise a part of the record, must be brought in by a statement of the case. *State v. Scholfield*, 664.
24. Where the facts are extrinsic as to the record proper, and do not appear in the statement of the case, errors based thereon are not reviewable. *State v. Scholfield*, 664.
25. Upon facts stated in the opinion, held, an abuse of discretion to permit further delay for the purpose of preparing and presenting a proper and sufficient record. *State v. Scholfield*, 664.

APPEARANCE. See **ACTION**, 58; **SUMMONS**, 305.

1. Appearance makes void process valid. *Simenson v. Simenson*, 305.
2. Appearance by a partner, not served with summons, in an action in which another partner is a party, and participates therein, does not thereby admit that he is a partner. *State v. McMaster*, 58.

ASSAULT. See **CRIMINAL LAW**, 337.**ASSAULT AND BATTERY.** See **CRIMINAL LAW**, 337.**ASSESSMENT AND TAXATION.** See **TAXATION**, 467.**ATTACHMENT.** See **JUDGMENT**, 182; **DEEDS**, 629.**ATTORNEYS.** See **APPEAL AND ERROR**, 74, 85; **MUNICIPAL CORPORATIONS**, 587.**AUDITORS.** See **TAXATION**, 351; **ELECTIONS**, 420.

1. County auditor has no authority except such as is expressly or impliedly conferred upon him by statute. *Patton v. Cass County*, 351.

BAIL. See **BASTARDY PROCEEDINGS**, 383.

1. In order that it may not prejudice the rights of a defendant in a criminal case upon his final trial, this court will not ordinarily, in refusing an application for bail, discuss either the facts or the law of the case. *State v. Hartzel*, 356.
2. Upon the record presented in this application it is held, that (1) the petitioners are not entitled to bail as a matter of strict legal right, and (2) that no cause is shown for granting it as matter of discretion. *State v. Hartzell*, 356.

BAIL—Continued.

3. Although defendant's arrest was illegal, because there was no sufficient showing of probable cause upon oath, the defendant waived all objections to the jurisdiction of the magistrate by giving bail, procuring adjournments, without objection to the validity of the arrest. *State v. McLain*, 368.

BALLOT. See **ELECTIONS**, 406, 420.

BANKS AND BANKRUPTCY. See **DEED**, 601.

BASTARDY.

1. The jurisdiction of the district court over the person of the defendant and the subject matter in bastardy proceedings, is complete when the transcript of the proceedings before the justice court are lodged with the clerk of the district court. *State v. Carroll*, 383.
2. In bastardy proceedings, when bail is furnished and approved by the magistrate, it is not necessary that his transcript of proceedings should show any formal order or judgment holding the defendant for trial. *State v. Carroll*, 383.

BONA FIDE PURCHASER. See **NEGOTIABLE INSTRUMENTS**, 74; **TRUSTS**, 411; **SALES**, 453.

1. One who pays to the grantor the entire consideration for a conveyance after notice of the invalidity of the grantor's title is not a bona fide purchaser, even though he received the conveyance before such notice. *Halloran v. Holmes*, 411.

BRIDGES. See **MUNICIPAL CORPORATIONS**, 47.

1. City can construct bridges only on street or highway having a legal existence, where funds are raised by taxation. *Manning v. City of Devils Lake*, 47.

BROKERS.

1. Where a sale, negotiated by a broker according to his contract, is prevented by the owner of the land refusing to convey, the latter is liable to the broker for the loss he has suffered in commissions. *Canfield v. Orange*, 622.
2. The measure of damages which a broker suffers by reason of the refusal of the owner of the land to convey according to his contract is the profit he would have made had the sale been consummated. *Canfield v. Orange*, 622.
3. A real estate broker, with whom land is listed for sale under an ordinary listing contract, is entitled to the commission provided for in his contract, when he presents to the owner a purchaser who is ready, willing and able to purchase upon the terms specified in the listing contract or upon modified terms which are assented to by the owner; and the refusal of the owner to consummate the sale upon the terms to which he has assented will not defeat the agent's right to his commissions. *Ward & Murray v. McQueen*, 153.

BURDEN OF PROOF. See EVIDENCE, 284; MASTER AND SERV-
ANT, 432.

1. The burden of proving the notice of expiration of the period of redemption under a tax judgment is upon him asserting title thereunder. *Cruser v. Williams*, 284.

BURGLARY. See CRIMINAL LAW, 655.

CHATTEL MORTGAGES. See VENDOR AND PURCHASER, 508.

1. Where the mortgagor under a chattel mortgage upon a stock of merchandise, continues the business under the contract with the mortgagee, as his agent, under the terms of which contract he is to make purchases of goods to replenish the stock, the mortgagee is liable as an undisclosed principal for such purpose. *Patrick & Co. v. Grand Forks Mercantile Co.*, 12.
2. Where the vendee in an executory contract for the sale of land reserves title to the crops grown thereon until the fulfilment of certain conditions by the vendee, and the vendor relinquishes to the vendee, for a consideration, all his interest in such crops, the title thereto vests in the vendee, and a chattel mortgage previously given by her would attach. *Thurston v. Osborne-McMillan Elevator Co.*, 508.
3. Where a surety upon a note secured by a chattel mortgage pays the note, he becomes the owner of the note and mortgage, and can recover the value of the property mortgaged from one who converts it, to the extent of his lien. *Thurston v. Osborne-McMillan Elevator Co.*, 508.
4. A second mortgagee can redeem from a chattel mortgage sale under section 5894, Rev. Codes 1899. *Brown v. Smith*, 580.
5. Notice of intention to redeem from a chattel mortgage sale is served in time if served with as reasonable promptness as it can be. *Brown v. Smith*, 580.
6. To effect a redemption from a chattel mortgage sale, tender of the amount necessary to redeem must be made as provided in section 3814, Rev. Codes 1899. *Brown v. Smith*, 580.

CITIES. See MUNICIPAL CORPORATIONS.

COMMITTING MAGISTRATE. See CRIMINAL LAW, 368, 494;
BASTARDY, 383; PRELIMINARY EXAMINATION, 649.

COMPLAINT. See PLEADING, 487, 591, 604; PRELIMINARY EX-
AMINATION, 649.

CONSIDERATION. See SPECIFIC PERFORMANCE, 107; FRAUDU-
LENT CONVEYANCE, 182.

CONSTITUTIONAL LAW. See JURY, 131.

1. The "right of trial by jury," which is secured to all by section 7 of the state constitution, includes all of the substantial elements of the trial by jury as they were known to and understood by the framers of the constitution and the people who adopted it. *Barry v. Traux*, 131.
2. The right of trial by jury, as fixed in the constitution, is subject to the change of the place of trial at the instance of the state, when necessary to secure a fair and impartial trial, and the right as thus known and understood is that which is secured by the Constitution. *Barry v. Traux*, 131.
3. The statute authorizing a change of the place of trial in criminal cases upon the application of the state's attorney, when a fair and impartial trial cannot be had in the original county, merely perpetuates the right as it was known when the constitution was adopted, and at the common law, and does not violate the right of trial by jury as secured by section 7 of the State Constitution. *Barry v. Traux*, 131.
4. Chapter 161, page 213, Laws 1903, which provides for the enforcement of payment, by judicial proceedings, of taxes upon real property sold to the county or state and remaining unredeemed for more than three years, and gives the several boards of county commissioners of all counties in the state a discretionary authority to institute proceedings therein provided for, is constitutional. *Picton v. Cass County*, 242.
5. Section 494, Rev. Codes 1899, which prohibits the printing of the name of a candidate for office in more than one column on the official ballot is constitutional. *State v. Porter*, 406.

CONTEMPT.

1. An order committing an attorney for contempt during the progress of a trial is an independent order, and appealable by the party aggrieved. Where the client of such attorney desires to urge such action, "as an irregularity in the proceedings of the court, and an abuse of its discretion, by which such party is deprived of a fair trial," the application "must be upon affidavit," under section 5473, Rev. Codes 1899. *King v. Hanson*, 85.

CONTINUANCE. See AFFIDAVIT, 383.

CONTRACTS. See HOMESTEAD, 167; DAMAGES, 204; PRINCIPAL AND AGENT, 232; VENDOR AND PURCHASER, 487; COUNTY COMMISSIONERS, 610; GAMING, 639.

1. The validity of a contract of a municipal corporation, that can be performed only by a resort to taxation, depends upon its power to so tax. *Manning v. Devils Lake*, 47.

CONTRACTS—Continued.

2. Equity will not decree the specific performance of a writing which lacks the two essential elements of a contract, viz., consideration, and mutual assent of the signers to all the terms of the writing, *Kaster v. Mason*, 107.
4. Where a writing, as a whole, does not purport to be a contract between two persons, but recites the dealing of a signer with himself, the court, upon parol proof, will not require the owners of the land described in the writing to sign the same, and then decree a specific performance of the writing as reformed. *Kaster v. Mason*, 107.
5. A written order for machinery to be shipped to the purchaser, fully describing the machinery and terms of purchase, becomes a contract by the unconditional acceptance of such order. *Reeves & Co. v. Bruening*, 157.
6. Until such order is accepted it is not a contract and may be revoked, but not after acceptance. *Reeves & Co. v. Bruening*, 157.
7. A written contract can be modified orally if the modified agreement is executed. *Reeves & Co. v. Bruening*, 157.
8. When a written contract of sale specifies the terms under which delivery shall be made, delivery is not shown as a matter of law by pointing out the property in a deliverable condition, nothing being said or done to show a waiver of some of the conditions under which delivery was to be made, and the title was to pass. *Reeves & Co. v. Bruening*, 157.
9. All parties to a joint contract should be made defendants in an action to enforce it. *Clements v. Miller*, 176.
10. In the absence of language in a contract showing a contrary intention, the obligations of the parties thereto are presumed to be joint, not several. *Clements v. Miller*, 176.
11. The obligations of parties to a joint contract of hiring are the same as those assumed by partners in a similar one, and are joint obligations. *Clements v. Miller*, 176.
12. Where a contract provides that "settlements of accounts governed by it are to be consummated only by written approval of said party of the first part from its home office," the parties may make a valid settlement under such contract, although the settlement is not made or approved in writing. *Dowagac Mfg. Co. v. Hellekson*, 257.
13. A written contract for sale of land cannot be modified by an unexecuted oral contract, although the modification pertains only to the performance of the contract. *Coghan v. Larson*, 373.
14. Where a contract of a board of county commissioners is ultra vires, delay of a resident taxpayer in restraining expenditures under it, is not laches. *Fox v. Walley*, 610.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE, 221; INSTRUCTIONS, 591.

CONVERSION.

1. Where a surety upon a note secured by a chattel mortgage pays the note, he becomes the owner of the note and mortgage, and may recover the value of the property mortgaged to the extent of his lien, from one who has converted it. *Thurston v. Osborne-McMillan Elevator Co.*, 508.

CORPORATIONS.

1. A negotiable promissory note void in the hands of the payee, a foreign corporation, because it is doing business in the state without complying with its laws, may be enforced by a bona fide purchaser and endorsee for value, before maturity, without notice of the facts rendering it void in the hands of the payee, notwithstanding section 3265, Rev. Codes 1899. *Bank v. Pick*, 74.
2. A creditor whose claim has not been reduced to judgment may maintain an action against an insolvent corporation on behalf of himself and all other creditors, to enforce stockholders' liabilities as defined by section 2902, Rev. Codes 1899. Sections 5767-5770 authorize such an action. *Marshall-Wells Hardware Co. v. New Era Coal Co.*, 396.
3. Section 5773, Rev. Codes 1899, authorizes an injunction prohibiting creditors from proceeding with actions against an insolvent corporation, where a creditor has brought an action under sections 5767-5770. But it is an abuse of discretion to issue an injunction under said section against a creditor who has brought an action to enforce a lien in his favor when it is shown that general creditors can in no event derive any benefit from the proceeds of the property covered by the liens; and it is also an abuse of discretion to grant an injunction against the foreclosure of a lien in such case or to restrain a pending action by a creditor against a corporation owning property, without first appointing a receiver to preserve such property. *Marshall-Wells Hardware Co. v. New Era Coal Co.*, 396.
4. Where one person is the cashier of a bank and the secretary of another corporation, and is the active manager of both, a deposit by him in the bank of the consideration for a conveyance of land to the corporation of which he is the secretary is not equivalent to payment to the grantee as a bona fide purchaser, when such deposit is retained in the bank under the direction of such person, and subject to his actual control, and is subsequently paid over to the grantor after notice of the invalidity of the grantor's title. *Haloran v. Holmes*, 411.

COSTS AND DISBURSEMENTS.

1. Respondents are entitled to costs upon an appeal from an order not appealable. *Tracy v. Scott*, 577.

COUNTERCLAIM. See PLEADING, 267, 319, 516.

1. One slander cannot be pleaded as a counterclaim against another. *Wrege v. Jones*, 267.
2. New matter constituting a defense or counterclaim must be set forth in the answer to admit of evidence of it. The new matter of the Code admits that all the material allegations of the complaint are true, and consists of facts not alleged therein which destroy the right of action and defeat a recovery. *Hogen v. Klabo*, 319.

COUNTY COMMISSIONERS. See LEGISLATURE, 242.

1. A resident freeholder and taxpayer of a county may restrain its county commissioners from making unlawful expenditures. *Fox v. Walley*, 610.
2. County commissioners have no authority to employ a person to collect a judgment belonging to the county from which no appeal has been taken, and the time for which appeal has expired, which employment contemplated the bringing of supplementary proceedings and divers actions against the judgment debtor and others. Such power is exclusively within the control and jurisdiction of the district court. *Fox v. Walley*, 610.
3. Where a contract made by county commissioners is ultra vires, laches in bringing action is no defense. *Fox v. Walley*, 610.

COURTS. See JUDGMENT, 182; MANDAMUS, 211; ELECTION, 420; ERROR AND APPEAL, 411.

1. It is within the discretion of the trial court to exclude witnesses while other witnesses are testifying. *King v. Hanson*, 85.

CREDITORS. See CORPORATIONS, 396.

1. A creditor whose claim has not been reduced to judgment may maintain an action against an insolvent corporation on behalf of himself and all other creditors to enforce stockholders' liabilities as defined in section 2902, Rev. Codes 1899. Sections 5767-5770 authorize such an action. *Marshall-Wells Hardware Co. v. New Era Coal Co.*, 396.
2. Section 5770, Rev. Codes 1899, authorizes an injunction prohibiting creditors from proceeding with actions against an insolvent corporation where a creditor has brought an action under sections 5767-5770. But it is an abuse of discretion to issue an injunction under said section against a creditor who has brought an action to foreclose a lien in his favor, when creditors can in no event derive any benefit from the proceeds of property covered by the liens, and to grant an injunction against such foreclosure, or to restrain a pending action by a creditor against such corporation owning property without appointing a receiver to preserve it. *Marshall-Wells Hardware Co. v. New Era Coal Co.*, 396.

CRIMINAL LAW. See INSTRUCTIONS, 494, 649.

1. Sections 7115, 7145, Rev. Codes 1899, construed and held, that the class of acts described as "assault and battery" with any deadly weapon, etc., in section 7115, and by the term "assault or assault and battery" with any sharp or dangerous weapon, in section 7145, does not include an assault or assault and battery with firearms for the purpose of shooting. *State v. Cruikshank*, 337.
2. A verdict finding the defendant guilty of "assault with a dangerous weapon, with intent to do bodily harm" does not warrant a judgment and sentence for a felony defined in section 7145, Rev. Codes 1899, as an attempt to shoot with intent to do bodily harm. *State v. Cruikshank*, 337.
3. The verdict convicts the defendant of an assault only, and is sustained by the evidence. *State v. Cruikshank*, 337.
4. A criminal complaint, wherein the facts constituting the crime charged are stated upon the information and belief only of the complaining witness, is not sufficient to justify the issuance of a warrant of arrest. *State v. McLain*, 368.
5. Although the arrest of the defendant upon a magistrate's warrant was illegal, because there was no sufficient showing of probable cause upon oath, the defendant waived all objections to the jurisdiction of the magistrate to proceed with the preliminary examination by giving bail, procuring adjournment of the hearing and taking a change of venue without objection to the validity of the arrest. *State v. McLain*, 368.
6. Where accused gave bail and fails to appear at a preliminary examination, but is there represented by counsel, he cannot impeach the commitment because the magistrate proceeded in his absence, but in the presence of his counsel at the stated time and place. *State v. McLain*, 368.
7. Where the defendant in a criminal case is accused of shooting or attempting to shoot with intent to kill or of shooting or attempting to shoot with intent to do bodily harm, a verdict for assault with a deadly weapon with intent to do bodily harm will not warrant sentence for more than simple assault. *State v. Mattison*, 391.
8. An information which purports to charge a single offense, but in stating the facts and circumstances alleged to constitute such crime unnecessarily alleges matters of aggravation, which sufficiently describe one or more other crimes not necessarily included in the one offense intended to be charged, is bad for duplicity. *State v. Mattison*, 391.
9. Maiming is not an offense included in the crime of shooting with intent to kill. *State v. Mattison*, 391.
10. Where an information definitely purports to charge a given offense, but is duplicitous, and it clearly appears from the record that the defendants, notwithstanding their objection, were compelled to submit to a trial for the offense which the information purported to charge, on the erroneous theory that the other offense was one

CRIMINAL LAW—Continued.

- included in the crime which the information purported to allege, the objection for duplicity cannot be avoided, even though the information discloses a sufficient charge of a third offense, which might be construed to include the two former. *State v. Mattison*, 391.
10. An information for the crime of robbery, as defined in section 7717, Rev. Codes 1899, is sufficient to charge a taking with intent to steal the property taken, when it charges that the defendant "unlawfully, wrongfully and feloniously * * * did take and carry away," etc. *State v. Fordham*, 494.
 12. It is the duty of the court to charge, that to constitute robbery, the taking of the property must have been with intent to steal it, whether requested so to charge or not, the intent being a substantive element of this crime. *State v. Fordham*, 494.
 13. The word "wrongful," as used in defining robbery, is equivalent to "felonious." *State v. Fordham*, 494.
 14. It is not error for the court to read the statute to the jury providing that defendant's failure to testify in his own behalf shall not be considered by the jury. *State v. Wisniewski*, 649.
 15. Presence and co-operation of a detective is no defense in a charge of burglary, if the detective did not instigate the crime, and it was committed in every ingredient by the prisoner. *State v. Currie*, 655.
 16. Passive consent to a burglary by owner of building for the purpose of detection is no defense to the burglar. *State v. Currie*, 655.
 17. Where the accused commits the offense of burglary in all its elements he is guilty notwithstanding the complicity of a detective. *State v. Currie*, 655.
 18. The Supreme Court cannot review alleged errors in the absence of a record of the facts upon which the orders and rulings were made. *State v. Gerhart*, 663.

CROSS EXAMINATION. See WITNESS, 312; TRIAL, 319.

DAMAGES. See HUSBAND AND WIFE, 85; MASTER AND SERVANT, 432; SLANDER AND LIBEL, 525.

1. The rule laid down in section 4978, Rev. Codes 1899, for measuring damages which are recoverable for a breach of contract, is in effect the common law rule, namely, compensation for all detriment proximately and naturally caused by the breach. *Hayes v. Cooley*, 204.
2. In an action for damages for the breach of a contract to thresh grain, which is not entered into under such special or exceptional circumstances that it may be reasonably inferred that other than the ordinary liability was contemplated by the parties, the loss of grain by exposure to storms is a remote, and not a proximate, consequence of the breach, and will not sustain a recovery. *Hayes v. Cooley*, 204.

DAMAGES—Continued.

3. Where, in such action, one relies upon special circumstances attending the execution of the contract to show that other than the ordinary liability was contemplated, it is necessary to allege and prove them; otherwise the contract will be considered as having been made with reference to only such liabilities as would ordinarily follow its breach. *Hayes v. Cooley*, 204.
4. Under section 4995, Rev. Codes 1899, one injured by the breach of an agent's warranty of authority may recover damages therefor in "the amount which could have been recovered and collected from his principal if the warranty had been complied with," and, in addition thereto, "the reasonable expenses of legal proceedings taken in good faith to enforce the act of the agent against his principal." *Kennedy v. Stonehouse*, 232.
5. In an action for slander and libel, the right to recover punitive damages depends upon the presence of actual malice; and where such damages are claimed, the presence or absence of actual malice, and its degree, is a vital and material question. In such cases the defendant may, under a sufficient answer, testify directly to his intent or motive, and also as to facts and circumstances which were within his knowledge and relied upon by him which tend to characterize his motive. *Wrege v. Jones*, 267.
6. Sheriff is not liable for damages for sale of homestead under execution, except possibly for costs in removing cloud upon title. *Johnson v. Twichell*, 426.
7. Section 4988, Rev. Codes 1899, prescribing the rule of damages upon failure to accept and pay for personal property, the title to which is not vested in the vendee, is not applicable as a rule of damages, where the property has been delivered to the vendee. *Dowagiac Mfg. Co. v. Mahon*, 516.
8. In a libel suit, where punitive as well as compensatory damages are allowable, \$7,000 damages is not an excessive award. *Lauder v. Jones*, 525.
9. The measure of a broker's loss by reason of the refusal of the owner of land listed for sale, to convey, is the profit that the broker would have made had the sale been consummated. *Canfield v. Orange*, 622.

DEATH. See AGENCY, 574.

DECEIT. See PLEADINGS, 516.

DEEDS.

1. A deed is absolute unless shown by proof clear, satisfactory and specific to be a mortgage. *N. W. F. & M. Ins. Co. v. Lough*, 601.
2. A deed by the cashier of a bank to himself is presumptively void. *N. W. F. & M. Ins. Co. v. Lough*, 601.
3. The date of a deed is presumed to be correct and its delivery made on such date. *Leonard v. Fleming*, 629.

DEEDS—Continued.

4. A deed delivered before and recorded after an attachment prevails over such attachment. *Leonard v. Fleming*, 629.
5. The declarations or admissions of a grantor in a deed, made after he has parted with the title, are not competent to defeat such title. *Leonard v. Fleming*, 629.

DELEGATION OF POWER. See LEGISLATURE, 242; MASTER AND SERVANT, 432.

DELIVERY. See SALES, 157.

1. Where a written contract of sale specifies the terms under which delivery shall be made, delivery is not shown as a matter of law by pointing out the property in a deliverable condition, nothing being said or done to show a waiver of some of the conditions under which delivery was to be made and the title was to pass. *Reeves & Co. v. Bruening*, 157.
2. Intention of the parties at the time that delivery is claimed to have been made, determines whether delivery was made or not.

DEPOSITIONS. See TRIAL, 453.

DETECTIVE. See CRIMINAL LAW, 455.

DISCRETION. See COURTS, 85; CHANGE OF VENUE, 112; LEGISLATURE, 242; TRIAL, 312.

1. Permitting leading questions, and limiting cross-examination rest in the discretion of the trial judge and his action is disturbed only by manifest abuse. *Josephson v. Sigfusson*, 312.
2. The trial court did not abuse its discretion in vacating a default judgment, where the default was in the service of answer, and but for one day, and arose from a mistake as to the date of service of the summons and complaint, and the defendant moved promptly for relief. *Braseth v. County of Bottineau*, 344.
3. Upon the record presented in the application for bail it is held that (1) the petitioners are not entitled to bail as a matter of strict legal right, and (2) that no cause is shown for granting it as a matter of discretion. *State v. Hartzell*, 356.
4. Upon the facts stated in the opinion further delay to prepare a record would be an abuse of discretion. *State v. Scholfield*, 664.
5. It is an abuse of discretion to issue an injunction under section 5773, Rev. Codes 1899, against a creditor who has brought an action to foreclose a lien in his favor where it is shown that general creditors can in no event derive any benefit from the proceeds of the property covered by the liens; and to grant an injunction against the foreclosure of a lien in such case or to restrain a pending action without first appointing a receiver to preserve such property. *Marshall-Wells Hardware Co. v. New Era Coal Co.*, 396.

DISMISSAL. See ADVERSE CLAIMS, 199; MANDAMUS, 211.

DIVORCE. See HUSBAND AND WIFE, 167.

1. A wife voluntarily abandoning a homestead in land held by her husband, under an oral contract for its purchase upon specified terms, followed by occupancy under such contract and part performance thereof, cannot thereafter claim such land as a homestead, although the ownership thereof is awarded to her absolutely by a decree in which she is granted a divorce. *Helgebye v. Dammen*, 167.

DUPLICITY. See CRIMINAL LAW, 391.

DURESS.

1. Payment of a judgment under duress by execution of legal process does not waive the right to appeal therefrom. *Signor v. Clark*, 35.

EJECTMENT. See ADVERSE CLAIMS, 199; DAMAGES, 232.

ELECTIONS.

1. Section 491, Rev. Codes 1899, which prohibits the printing of the name of a candidate for office in more than one column of the official ballot, is, as to a candidate who is the nominee of a single political party and the nominee of electors by petition, a reasonable regulation of the manner of exercising the right of suffrage, and is valid and constitutional. *State v. Porter*, 406.
2. The determination of a contest between rival delegates by the state central committee of a political party approved by a state convention of such party, is conclusive upon the courts. *State v. Larson*, 420.
3. Where relator was nominated for county treasurer by one of two rival conventions of a political party, which elected delegates to the state convention, and the state central committee determines the regularity of relator's convention, which action is approved by the state convention, it was the duty of the county auditor to print relator's name upon the official ballot as the nominee of his party, and he will be compelled by mandamus to do so. *State v. Larson*, 420.

EQUITY. See INJUNCTIONS, 84, 357; VENDOR AND PURCHASER, 373; TAXATION, 468.

1. Under prayer for general relief, in an action for specific performance, the court may order redeeding of the property sold, or a cancellation of the deed given, where fulfilment of contract is delayed until the real inducement on the part of the seller has failed. *Block v. Donovan*, 1.
2. Equity will not decree a specific performance of a writing which lacks two essential elements of a contract, viz., consideration and mutual assent of the signers to all the terms of the writing. *Kaster v. Mason*, 107.

EQUITY—Continued.

3. Where a writing as a whole does not purport to be a contract between two or more persons, but recites a dealing of a signer with himself, equity will not, upon parol proof compel the signature of the owner of land described therein and decree a specific performance as reformed. *Kaster v. Mason*, 107.
4. An injunctive order which is uncertain with respect to the acts enjoined thereby is void. *Regan v. Sorenson*, 357.
5. Forfeitures in a contract for the purchase of land by the vendor upon defaults in payments, where time has not been treated as of the essence of the contract, will not be upheld in a court of equity. *Coughan v. Larson*, 373.
6. In an equitable action brought to set aside a tax sale made in 1897 and to cancel the assessment, absence of the assessor's affidavit from the assessment roll does not invalidate the sale or levy. *Douglas v. Fargo*, 467.
7. The omission to attach the assessor's affidavit to the assessment roll is fatal in an action at law. In equity, without an allegation that the assessment was unfair, unjust or fraudulent, it will not invalidate. *Douglas v. Fargo*, 467.
8. Courts of equity should, in general, interfere to restrain the collection of a tax or annul proceedings only when it appears either that the property sought to be taxed is not subject to taxation, or the tax itself is not wholly authorized by law, or the taxes are assessed or levied by unauthorized persons, or the taxing officers have acted fraudulently, or the taxes have been unjustly levied, or the assessment made unjustly, or without uniformity; and the plaintiff must, in addition, bring himself within some recognized head of equity jurisprudence, and must also tender or pay the taxes justly chargeable upon his property, before an injunction should issue to restrain their collection, unless statutory provisions make such tender unnecessary. *Douglas v. Fargo*, 467.
9. In an equitable action to cancel and set aside a tax sale and levy, the complaint must show a tender. *Douglas v. Fargo*, 467.
10. If the complaint or evidence shows that a portion of the taxes are legal and part illegal, a court of equity will not restrain the collection of the illegal portion, except on the condition that the legal portion has been paid or tendered. *Douglas v. Fargo*, 467.

ESTATES OF DECEDENTS. See EXECUTORS AND ADMINISTRATORS, 513.

ESTOPPEL. See INSURANCE, 444; PRINCIPAL AND AGENT, 453.

1. A defendant enjoining the foreclosure of a mortgage by advertisement under a power of sale therein, is not estopped, in a subsequent action to foreclose the same mortgage, to plead the statute of limitations therein. *Teigen v. Drake*, 502.

ESTOPPEL—Continued.

2. An equitable estoppel by deed or in pais is not created or enforceable unless there has been a change in the situation of one of the parties in reliance on the deed or statements, followed by damage. *Haugen v. Skjervheim*, 616.
3. To create an estoppel, the evidence must be clear, and not a matter of inference.

EVIDENCE. See CRIMINAL LAW, 337; PRACTICE, 444.

1. In the absence of proof, except the recitals of the order, such order will be presumed, upon appeal, to be based upon competent evidence. *Block v. Donovan*, 1.
2. In an action for alienation of husband's affections, it is proper to show a continuation of adulterous relations between defendant and plaintiff's husband, in a state where such alienation is not an actionable wrong, after his abandonment of plaintiff in a state where it is actionable. *King v. Hanson*, 85.
3. Where the admission of evidence depends upon disputed facts, the dispute may be submitted to the jury under proper instructions. *King v. Hanson*, 85.
4. Where exemplary damages may be awarded, evidence of defendant's wealth is proper. *King v. Hanson*, 85.
5. The finding of intoxicating liquors on the premises occupied by the defendant is prima facie evidence only when such finding is by the searching officer with the proper process. *State v. Nelson*, 122.
6. In an equitable action for the abatement of a liquor nuisance, the finding of intoxicating liquor in the possession of the defendant is not, under section 7614, Rev. Codes 1899, presumptive evidence that the same was kept for sale contrary to law. *State v. Nelson*, 122.
7. Parol evidence is inadmissible to vary the terms of an accepted order. *Reeves & Co. v. Bruening*, 157.
8. Where a written executory contract of sale specified the terms under which a delivery shall be made, delivery is not shown as a matter of law by pointing out the property in a deliverable condition, nothing being said or done to show a waiver of some of the conditions under which delivery was to be made and the title was to pass. *Reeves & Co. v. Bruening*, 157.
9. A general agent, whose authority is not in writing, is a competent witness as to what authority he has. *Reeves & Co. v. Bruening*, 157.
10. A judgment regularly rendered and entered by a court of competent jurisdiction is, in the absence of allegation and proof of fraud or collusion, conclusive evidence of the debt and its amount, in an action to try title by a judgment creditor against an alleged fraudulent grantee of the debtor. *Salemonson v. Thompson*, 182.

EVIDENCE—Continued.

11. Where words are spoken which are slanderous per se, malice is conclusively presumed, for the purpose of recovering actual damages. The malice which by legal fiction is thus presumed to exist, is malice in law, or legal malice, as distinguished from malice in fact, or actual malice. *Wrege v. Jones*, 267.
12. In an action for slander and libel the defendant may, under a sufficient answer, testify directly to his motive or intent, and also as to facts and circumstances which were within his knowledge and relied upon by him, which tend to characterize his motive. Under a plea in mitigation, defendant offered evidence as to his motive in speaking the slanderous words, and also as to the facts and circumstances which prompted the utterance, held, that the exclusion of this evidence was prejudicial error. *Wrege v. Jones*, 267.
13. The burden of proving service of notice of expiration of period of redemption and filing thereof, under chapter 67, Laws of 1899, relating to tax judgments, is upon the person asserting title thereunder. *Cruser v. Williams*, 284.
14. Oral testimony is admissible to show facts accruing on a presentment of a note for payment, which are not stated in the notary public's certificate of presentment. *Nelson v. Grondahl*, 363.
15. A notary public's testimony that he invariably presented notes for payment at the place where they were made payable, is admissible to establish the place of presentment, where a notary's certificate of protest fails to show the place of presentment, and the notary has no independent recollection of the specific presentment evidenced by his certificate. *Nelson v. Grondahl*, 363.
16. Reversible error cannot be predicated upon the admission of incompetent evidence of a fact which is otherwise established and is not controverted upon the trial. *Cairncross v. Omlie*, 387.
17. In an action to establish plaintiff's ownership of land, and to prevent a conveyance thereof by the defendant, apparently clothed with an absolute title, which the complaint alleges the defendant holds only as security for a debt, proof that the defendant's title is a mere passive trust is not such a variance as to constitute a failure of proof. *Halloran v. Holmes*, 411.
18. An objection to the admission of evidence on the ground that it is a material variance from the pleadings is of no avail unless the objection is supported by proof that the variance has misled the objecting party, to his prejudice, in maintaining his cause of action or defense on the merits. *Halloran v. Holmes*, 411.
19. Opinion evidence of expert witnesses as to which of two or more causes produced a given effect are not admissible in evidence where the conditions necessary to the operation of the different causes can be described with sufficient clearness, so that the jury can understand them, and intelligently form an opinion. *Meehan v. Great Northern Ry. Co.*, 432.

EVIDENCE—Continued.

20. In an action for damages on account of defendant's negligence, where it appears that there were two or more possible causes of the injury, only one of which is chargeable to defendant's negligence, the plaintiff must prove that it was more probable that the injury resulted from the cause for which the defendant was responsible. *Meehan v. Great Northern Ry. Co.*, 432.
21. To justify an order for judgment notwithstanding the verdict, the record must affirmatively show, not only that the verdict is not justified by the evidence, but it must also appear that there is no reasonable probability that the defects in the proof necessary to support the verdict may be remedied at another trial. *Meehan v. Great Northern Ry. Co.*, 432.
22. When a defamatory charge is made upon an unprivileged occasion, the law implies malice; upon a privileged occasion, the burden is upon the plaintiff to prove that it was made with actual malice. *Lauder v. Jones*, 525.
23. Former utterances on the same subject matter as the alleged libel, but not a distinct calumny, may be offered to prove malice. *Lauder v. Jones*, 525.
24. Testimony pertinent to the issues, uttered during the course of judicial proceedings, cannot be made the subject of an action for defamation; the occasion being privileged, the law presumes that such testimony is given in good faith, and without malice. *Lauder v. Jones*, 525.
25. As bearing upon the question of defendant's malice in publishing the alleged libel, an affidavit used in a proceeding in the Supreme Court was introduced in evidence; held, error, because (1), the statements contained in it do not relate to the subject matter of the alleged libel; (2), having been made upon a privileged occasion they are presumed to have been made in good faith. *Lauder v. Jones*, 525.
26. The falsity of a defamatory charge is always presumed. *Lauder v. Jones*, 525.
27. An application for life insurance stated that assured was not addicted to the habit of drinking intoxicating liquors and had never drunk immoderately; proof that he sometimes drank intoxicating liquors and on a few occasions appeared intoxicated, held insufficient to show false representations. *Puls v. Grand Lodge, etc.*, 559.
28. Proofs of death and verdict of a coroner's jury showing that the insured died from alcoholic poisoning, have no probative force in an action on a policy. *Puls v. Grand Lodge, etc.*, 559.
29. Testimony of persons who had opportunity to observe insured's habits, that they had seldom or never seen him drunk, or appear to be under the influence of liquor, was competent to show that the insured in a life insurance policy was not an habitual or immoderate drinker. *Puls v. Grand Lodge, etc.*, 559.

EVIDENCE—Continued.

30. The declarations of a sick or injured person as to the nature, symptoms and effects of the disease or injury under which he is suffering at the time are competent evidence in an action wherein the nature and cause of the malady are in question. *Puls v. Grand Lodge*, etc., 559.
31. A deed is absolute unless shown by proof clear, satisfactory and specific, to be a mortgage. *N. W. F. & M. Ins. Co. v. Lough*, 601.
32. A deed executed by the cashier of a bank to himself is presumtively void. *N. W. F. & M. Ins. Co. v. Lough*, 601.
33. To create an estoppel, the evidence must be clear and not a matter of inference. *Haugen v. Skjerheim*, 616.
34. A deed offered in evidence by the grantee is presumed to have been delivered on the day of its date, and such date is presumed to be true. *Leonard v. Fleming*, 629.
35. The declarations or admissions of a grantor, made after he has parted with the title, are not competent to defeat such title, where there is no evidence of fraud or conspiracy against creditors. *Leonard v. Fleming*, 629.
36. Evidence considered, and held not to show fraud, and not to overcome the presumption that the deed was delivered as of its date. *Leonard v. Fleming*, 629.
37. When the validity of a contract of sale for future delivery is involved, and it is shown that in numerous other and similar transactions no deliveries were made, but that settlements were made upon differences in market quotations, the person relying upon the validity of such a contract must make it satisfactorily and affirmatively appear that the contract was made with a view to actual delivery. *B. & R. Lbr. Co. v. Coe Commission Co.*, 639.
38. Evidence examined, held, that the transactions in question were wagers and void. *B. & R. Lbr. Co. v. Coe Commission Co.*, 639.

EXECUTORS AND ADMINISTRATORS.

1. The rejection of a claim against the estate of a decedent, either by the executor, administrator or county judge, is a condition precedent to the right to sue upon it. *In re Smith's Estate*, 513.
2. For the purpose of an action upon claims against an estate, and of limiting the time within which a suit must be brought, the constructive rejection, which follows in ten days' neglect or refusal to allow, is equivalent to a rejection by written indorsement. *In re Smith's Estate*, 513.
3. A claim may be allowed by a county judge after its rejection by nonaction or written indorsement, at any time before it is barred by a special or general statute of limitations. *In re Smith's Estate*, 513.

EXPERT TESTIMONY. See EVIDENCE, 432.

FINDINGS.

1. Findings of fact made by a trial court in an action, a jury being waived, are presumed to be correct, and will not be set aside unless shown to be clearly against the preponderance of the evidence. *Dowagiac Mfg. Co. v. Hellekson*, 257.

FORECLOSURE. See MORTGAGES, 502; SPECIAL PROCEEDINGS, 577; CHATTEL MORTGAGES, 580.

FOREIGN CORPORATIONS. See CORPORATIONS, 74.

FORFEITURES. See VENDOR AND PURCHASER, 373.

FRAUD. See JUDGMENTS, 182; FRAUDULENT CONVEYANCES, 182; PLEADINGS, 516; EVIDENCE, 629.

FRAUDS, STATUTE OF. See HOMESTEAD, 167.

FRAUDULENT CONVEYANCE.

1. Under section 5052, Rev. Codes 1899, "every transfer of property with the intent to delay or defraud any creditor, or any other person, of his demands, is void against all creditors of the debtor * * *." As between the parties, such transfers are valid; but as to creditors they are void at their election. The levy of a writ of attachment upon property transferred to defraud creditors is deemed an election by the creditor to treat the conveyance as void. Property so transferred is as much subject to a levy under an execution or writ of attachment as though no transfer had been made. *Salemonson v. Thompson*, 182.
2. A conveyance of property by a debtor, not made in good faith, but executed by the grantor and received by the grantee with intent to defraud creditors, is not relieved from the condemnation of the statute by the fact that it was given for a valuable consideration or to pay an honest debt. *Salemonson v. Thompson*, 182.

GAMING.

1. A contract for future delivery of grain or other property is valid when such delivery is intended, otherwise it is a wager and void. *B. & R. Lbr. Co. v. Coe Commission Co.*, 639.
2. Where it is shown that in numerous other and similar transactions to the one in suit, no deliveries were made, but differences in market quotations were settled, one asserting the validity of such a contract must show that it was made with a view to actual delivery. *B. & R. Lbr. Co. v. Coe Commission Co.*, 639.
3. Evidence examined, held, that in making the contracts of sale involved there was no intention to make a delivery, and that they were wagers upon the rise and fall of prices, and therefore void. *B. & R. Lbr. Co. v. Coe Commission Co.*, 639.

GENERAL AGENTS. See PRINCIPAL AND AGENT, 157.

HIGHWAYS. See **WATERS AND WATERCOURSES**, 458.

1. A person negligently obstructing a highway, causing injury to a person traveling thereon in the night time, without fault or negligence, said highway having been regularly traveled by the public for years, cannot defend against such negligence by proving that it was not legally established or traveled, and was upon a right of way of a railroad company. *Pewonka v. Stewart*, 117.

HOMESTEAD.

1. A homestead may be claimed on land resided upon, when the right to residence upon such land is based upon an oral contract for the purchase of such land, followed by occupancy under such contract and part performance thereof. *Helgebye v. Dammen*, 167.
2. The homestead of a married person cannot be conveyed or incumbered unless by an instrument executed and acknowledged by both husband and wife. *Helgebye v. Dammen*, 167.
3. A homestead cannot be claimed in land held on contract after default is made in such contract and the same is abandoned. *Helgebye v. Dammen*, 167.
4. After a voluntary abandonment of a homestead by husband and wife the latter cannot reassert the right under a decree in divorce proceedings awarding the ownership to her. *Helgebye v. Dammen*, 167.
5. A wife claiming a homestead under her husband's contract for the purchase of land, has no greater right thereto as a homestead than her husband would have under the contract. *Helgebye v. Dammen*, 167.
6. The sale by a sheriff, under execution, of real estate which is exempt as a homestead, conveys no estate or title to the purchaser, and the officer making such sale is not liable to the owner in an action for damages, except, perhaps, for costs incurred in removing an apparent cloud upon the title. *Johnson v. Twichell*, 426.

HOTELS. See **INTOXICATING LIQUORS**, 122.**HUSBAND AND WIFE.**

1. A married woman can maintain an action in this state and Minnesota against another woman for the alienation of her husband's affections, and his consequent abandonment of her. *King v. Hanson*, 85.
2. It was not error to admit evidence tending to show a continuation of the adulterous relations of defendant and plaintiff's husband, after the latter had abandoned the plaintiff in Minnesota, in a statement, in a state where the alienation of the husband's affections is not an actionable wrong. *King v. Hanson*, 85.
3. The homestead of a married person cannot be conveyed or incumbered in this state except by an instrument executed and acknowledged by both husband and wife. *Helgebye v. Dammen*, 167.

HUSBAND AND WIFE—Continued.

4. A wife voluntarily abandoning such land as a homestead, with her husband, cannot thereafter claim such land as a homestead, although ownership thereof is awarded to her absolutely by a decree in which she is granted a divorce. *Helgebye v. Dammen*, 167.
5. A wife has no greater right in land as a homestead, held by her husband under contract of purchase, than the husband would have under such contract. A husband cannot demand a deed of such land without compliance with the contract, nor can the wife demand a deed of such land until she has tendered performance of the terms of such contract in cases where the husband has abandoned the contract. *Helgebye v. Dammen*, 167.
6. Where a wife is the vendee in an executory contract for the purchase of land, the fact that her husband works for her on the land proves no title in him, and the crops raised thereon, so that a mortgage given by him creates a lien thereon. *Thurston v. Osborne-McMillan Elevator Co.*, 508.

INDICTMENT AND INFORMATION. See CRIMINAL LAW, 391, 494; PRELIMINARY EXAMINATION, 649.

INJUNCTIONS. See CORPORATIONS, 396; APPEAL AND ERROR, 577.

1. To authorize an injunction pendente lite under subdivision 1, section 5344, Rev. Codes 1899, the complaint must show a right to, and prayer for, a judgment of injunction against the commission or continuance of the acts, which continuance and commission, during the suit, would injure the plaintiff. *McClure v. Hunnewell*, 84.
2. A resident freeholder and taxpayer may restrain county commissioners from making unlawful expenditures. *Fox v. Walley*, 610.

INSTRUCTIONS.

1. Where the admission of evidence depends upon disputed facts, the court may submit the evidence to the jury with proper hypothetical instructions upon the rules which govern upon the state of facts as they find them. *King v. Hanson*, 85.
2. The instruction: "An attorney is a competent witness for his client on the trial of a case, and the testimony of such a witness shall not be disregarded by you simply because the witness is an attorney testifying in favor of his own client. In such a case you are the judges of the weight and credit to which such testimony is entitled," is not open to the objection that it singled out and cast discredit upon the testimony of one of the witnesses for the defendant. *King v. Hanson*, 85.
3. It is the duty of the trial court to instruct that to constitute robbery the taking of the property must have been with the intent to steal it, even though not requested. *State v. Fordham*, 494.

INSTRUCTIONS—Continued.

4. Where a case is submitted for a special verdict it is error to instruct generally. The jury should only be given instructions which are appropriate to the character of the verdict, and should not be informed of the effect of their answer, nor be required to answer in the form of a legal conclusion. *Morrison v. Lee*, 591.
5. In an action to recover for an injury resulting from defendant's negligence, the jury were given general instructions; and, as a part of their special verdict were instructed to answer whether the plaintiff was guilty of such contributory negligence as would bar him from recovery under the law laid down in the instruction; held, error. *Morrison v. Lee*, 591.
6. A requested instruction that the testimony of a witness having in view a reward in case of conviction, shall be received with distrust, is properly refused, as credit to be given his testimony is solely for the jury. *State v. Wisnewski*, 649.
7. An instruction that the jury must not consider defendant's failure to testify in his own behalf in arriving at a verdict, is not erroneous. *State v. Currie*, 655.

INSURANCE. See PRACTICE, 444.

1. The life insurance policy upon which the action was brought, contained this condition: "This policy shall not take effect unless the first premium is actually paid while the assured is in good health." Held, in the absence of an estoppel, the liability of the insurer depends upon the actual, and not mere apparent, good health of the assured when the first premium was paid. *Thompson v. Travelers Ins. Co.*, 444.
2. That the acceptance or retention of the premium may estop an insurer from relying upon a breach of contract in the policy, it must appear that it had knowledge of the facts constituting the breach. *Thompson v. Travelers' Ins. Co.*, 444.
3. A change in the health of an applicant for life insurance pending negotiations for a policy must be disclosed. *Thompson v. Travelers' Ins. Co.*, 444.
4. The application stated that assured was not addicted to the habit of drinking intoxicating liquors and had never drank immoderately; proof that he sometimes drank intoxicating liquors, and on a few occasions appeared intoxicated, held insufficient to show false representations. *Puls v. Grand Lodge, etc.*, 559.
5. Proof of death and verdict of a coroner's jury that insured died from alcoholic poisoning have no probative force. *Puls v. Grand Lodge, etc.*, 559.
6. Payment of dues by the financier of a local lodge upon an arrangement with a third party prevents the forfeiture of a life insurance policy. *Puls v. Grand Lodge, etc.*, 559.

INTOXICATING LIQUORS. See INSURANCE, 559.

1. An action for the abatement of a nuisance under section 7605, Rev. Codes 1899, abates upon the death of the only defendant served. *State v. McMaster*, 58.
2. Before intoxicating liquors can be destroyed under section 7605, Rev. Codes 1899, the nuisance must be shown to have been maintained by some person as a defendant and owner or keeper in a pending action. *State v. McMaster*, 58.
3. No proceeding in rem alone against the liquors kept is authorized under section 7605, but such liquors can only be destroyed in an action against the owner or keeper guilty of unlawfully keeping or using such liquors. *State v. McMaster*, 58.
4. Chapter 63 of the Penal Code recognizes intoxicating liquors as property having a legitimate use. *State v. McMaster*, 58.
5. An action under chapter 63 of the Penal Code having abated as to the principal defendant, and the cause of action not having survived, judgment cannot be rendered for the destruction of property seized, nor for the closing of the place. Such remedies are incidental to the main remedy, the abatement of the nuisance, which has abated by the death of defendant. *State v. McMaster*, 58.
6. It is not the selling or keeping for sale, or the resorting for the purpose of drinking, that constitutes the nuisance; but the keeping the place where any, or all of these things are done. *State v. Nelson*, 122.
7. To be the keeper of a liquor nuisance so as to subject the place to condemnation as such, the person must be an occupant under some claim of right, and not a mere transient or naked trespasser therein. *State v. Nelson*, 122.
8. The word "place", as used in section 7605, Rev. Codes 1899, relating to liquor nuisances, means the particular room, tenement or apartment wherein the unlawful business is done or the liquor is kept for sale or sold. *State v. Nelson*, 122.
9. Where a boarder in a hotel kept and sold intoxicating liquors to persons therein, without the knowledge or consent of its owner, lessee or proprietor, it could not be adjudged a common nuisance and closed as such; and the particular room or place where the liquor was kept or sold could only be adjudged a nuisance and abated, upon its being particularly identified in the proofs, so that the decree of abatement could point out the identical place without interfering with the rooms and rights of others. *State v. Nelson*, 122.
10. The finding of intoxicating liquors on the premises occupied by the defendant is prima facie evidence of the existence of a nuisance under the prohibition law only when found by the searching officer with the proper process. *State v. Nelson*, 122.
11. In an equitable action for the abatement of an alleged liquor nuisance the finding of intoxicating liquor in possession of the defendant is not, under section 7614, Rev. Codes 1899, presumptive evidence that the same was kept for sale contrary to law. *State v. Nelson*, 122.

JUDGMENTS. See INTOXICATING LIQUORS, 122; ADVERSE CLAIMS, 199; JURISDICTION, 327.

1. Paying and receiving a satisfaction of a judgment, without reserving the right to appeal therefrom, waives such right. *Signor v. Clark*, 35.
2. Payment of a judgment under duress and coercion, imposed by execution of legal process does not waive the right of appeal. *Signor v. Clark*, 35.
3. It is error to order judgment upon a stipulation not purporting to embody all the facts, and to exclude all evidence on the part of plaintiff, on defendant's motion, when upon any theory consistent with the complaint and stipulation plaintiff could have made proof entitling him to recover. *Bank v. Pick*, 74.
4. A judgment regularly rendered and entered by a court of competent jurisdiction is, in the absence of all allegation and proof of fraud or collusion, conclusive evidence of the debt and its amount in an action to try title by a judgment creditor against an alleged fraudulent grantee of the debtor. *Salemonson v. Thompson*, 182.
5. A judgment against a non-resident, where jurisdiction rests only upon service by publication, and the seizure of the debtor's property under a writ of attachment, has the same conclusive effect, to the extent of the debtor's interest in the property seized, as a judgment rendered upon personal service. *Salemonson v. Thompson*, 182.
6. In 1891 the defendant, as agent for the owner of certain real estate, and in her name, but without authority, executed and delivered to the plaintiff a written contract to sell and convey the same upon the crop payment plan. The plaintiff entered into possession, completed his payments, and became entitled to a deed in the fall of 1901. In March 1902, the plaintiff was ejected in an action instituted by the owner. Upon these facts, held, that a judgment for the value of the land at the date of the breach, and for his costs and expenses in defending the action of ejectment, was proper. *Kennedy v. Stonehouse*, 232.
7. Under chapter 67, p. 76, Laws of 1897, pertaining to obtaining judgments against specific tracts of land to enforce payment of taxes against a particular tract appearing on the list filed with the clerk as unpaid is not affected by the fact that all taxes against the owner and against the tract had been previously paid. *Purcell v. Farm Land Co.*, 327.
8. The trial court did not abuse its discretion in vacating a default judgment, where the default was in the service of answer, and for but one day, and arose from a mistake as to the date of service of the summons and complaint, and the defendant moved promptly for relief. *Braseth v. County of Bottineau*, 344.
9. When a judgment notwithstanding the verdict is reversed the case will be remanded to perfect a motion for a new trial asked in connection therewith. *Nelson v. Grondahl*, 363.

JUDGMENTS—Continued.

10. To justify a judgment notwithstanding the verdict, the record must affirmatively show, not only that the verdict is not justified by the evidence, but it must also appear that there is no reasonable probability that the defects in the proof necessary to support the verdict may be remedied upon another trial. *Meehan v. Great Northren Ry. Co.*, 432.

JURISDICTION. See MANDAMUS, 211; CRIMINAL LAW, 368.

1. Jurisdiction rests upon the fact, not the proof, of service of process. *Cruser v. Williams*, 284.
2. The publication of a summons, based upon a defective affidavit, under section 4900 Compiled Laws, confers no jurisdiction of the person of the defendant. *Simensen v. Simensen*, 305.
3. Jurisdiction to enter a tax judgment against a particular tract, appearing on the list filed with the clerk as unpaid, is not affected by the fact that the tax is paid. *Purcell v. Farm Land Co.*, 327.
4. Although the arrest of the defendant upon a magistrate's warrant was illegal because there was no sufficient showing of probable cause upon oath, the defendant waived all objection to the jurisdiction of the magistrate by giving bail, procuring adjournment, and taking change of venue. *State v. McLain*, 368.
5. The district court's jurisdiction over the person of the defendant and subject matter in bastardy proceedings is complete, when the transcript of proceedings before the justice and jurisdictional papers filed with him are lodged with the clerk of the district court. *State v. Carroll*, 383.

JURY. See CONSTITUTIONAL LAW, 131.

1. The "right of trial by jury," which is secured to all by section 7 of the State Constitution, includes all of the substantial elements of the trial by jury as they were known to and understood by the framers of the constitution and the people who adopted it. *Barry v. Taux*, 131.
2. The "right of trial by jury," as fixed in the constitution, is subject to the change of place of trial at the instance of the state, when necessary to secure a fair and impartial trial, and it was the right as thus known and understood which is secured by the constitution. *Barry v. Taux*, 131.
3. The right of trial by jury was always at common law subject to change to another county upon the application of either the prosecution or defense. *Barry v. Taux*, 131.
4. The statute authorizing a change of place of trial to another county upon the application of the state's attorney, when a fair and impartial trial cannot be had in the original county, merely perpetuates the right as it was known when the constitution was adopted, and also as it existed at the common law, and does not violate section 7 of the State Constitution. *Barry v. Taux*, 131.

JURY—Continued.

5. Where a law action, triable to a jury as a matter of strict legal right was tried to the court without a jury, and under section 5630, Rev. Codes 1899, over defendant's objection, and a jury was not waived, presents a mistrial, which requires a reversal of the judgment and a new trial. *Hanson v. Carlblom*, 361.
6. When a libelous charge is susceptible of two constructions, one innocent and one defamatory, the jury is to determine in which sense it was used. *Lauder v. Jones*, 525.
7. The credit to be given a witness testifying in view of a reward in case of conviction is solely a question for the jury. *State v. Wisniewski*, 649.

LEGISLATURE.

1. Chapter 161, p. 213, Laws of 1903, providing for the enforcement of payment, by judicial proceedings of taxes upon real property sold to the state or county, and remaining unredeemed for more than three years, and giving to the several boards of county commissioners of all counties in the state a discretionary authority to institute proceedings therein provided for, is not vulnerable to the objection that it delegates legislative power to said boards. The act is complete and is in force in every county in the state by legislative will. The discretion committed to the several boards is administrative only. *Picton v. Cass County*, 242.

LIBEL. See **SLANDER AND LIBEL**, 267, 525.

LIENS. See **TAXATION**, 284; **CORPORATIONS**, 396.

LIFE INSURANCE. See **INSURANCE**, 444, 559.

LIMITATIONS OF ACTIONS. See **RES ADJUDICATA**, 502; **EXECUTORS AND ADMINISTRATORS**, 513.

1. In 1891 the defendant, as agent of the owner of certain real estate, and in her name but without authority, and without believing in good faith that he had such authority, executed and delivered to the plaintiff a written contract to sell and convey the same upon the crop payment plan. The plaintiff entered into possession, completed his payments, and became entitled to a deed in the fall of 1891. In March 1902, the plaintiff was ejected in an action instituted by the owner. Upon these facts, held, that plaintiff's cause of action arose when he was ejected by the owner and is not barred by the statute of limitations. *Kennedy v. Stonehouse*, 232.
2. A defendant enjoining the foreclosure of a mortgage by advertisement is not estopped to plead the statute of limitation in a subsequent suit to foreclose the same mortgage. *Teigen v. Drake*, 502.

MAIMING. See **CRIMINAL LAW**, 391.

MANDAMUS.

1. In an action in the name of the state, *ex rel.*, the attorney general to remove a sheriff from office for alleged malfeasance, under section 5743 *et seq.*, Rev. Codes 1899, in which a motion to suspend the officer pending trial, pursuant to section 363, Rev. Codes 1899, was made, the district court on objection of defendant decided that it was without authority to try defendant for his removal from office in this form of action, and dismissed the motion and case. This was a judicial determination by the court of a matter properly before it, and whether right or wrong, will not be reviewed by mandamus. Relator's remedy is by appeal. *State v. District Court*, 211.
2. The rule that an inferior court will be required by mandamus to proceed and hear a case properly before it, but which it has refused to hear for the mistaken reason that it was without jurisdiction, has no application where the court has taken jurisdiction of the case, and in the exercise of the judicial function, has decided upon the question submitted to it for determination that the action was without authority of law to accomplish the desired purpose, and that the plaintiff has mistaken its remedy, and dismissed the case for this reason. *State v. District Court*, 211.
3. Where relator was nominated for county treasurer by one of two rival conventions of a political party, which also elected delegates to the state convention, and the state central committee determines the regularity of relator's convention, which action is approved by the state convention, the county auditor will be compelled by mandamus to place his name upon the ticket. *State v. Larson*, 420.

MARRIED WOMEN. See HUSBAND AND WIFE, 85, 508.

MASTER AND SERVANT.

1. It is the master's duty not only to provide proper appliances for the use of his employees, but also to exercise ordinary care to keep the appliances in proper repair. *Meehan v. Great Northern Ry. Co.*, 432.
2. The master's duty to provide proper appliances and keep them in proper repair cannot be delegated so as to avoid personal responsibility for the due performance of the duty. *Meehan v. Great Northern Ry. Co.*, 432.
3. The master is not liable for a defect in appliances resulting solely from use, unless the master knew, or ought have known of, and remedied the defect. *Meehan v. Great Northern Ry. Co.*, 432.
4. The employee does not assume the risk of the injury caused by the master's negligence, where he had no knowledge of the existing danger. *Meehan v. Great Northern Ry. Co.*, 432.

MISTAKE. See JUDGMENT, 344.

MISTRIAL. See JURY, 361.

MORTGAGES. See **CHATTEL MORTGAGES**, 12; **DEEDS**, 601.

1. A defendant enjoining the foreclosure of a mortgage by advertisement is not estopped to plead the statute of limitations in a subsequent action to foreclose the same mortgage. *Teigen v. Drake*, 502.
2. As to whether or not the right to foreclose by advertisement under a power of sale contained in a mortgage continues after an action to foreclose is barred by the statute of limitations, is not decided. *Teigen v. Drake*, 502.

MUNICIPAL CORPORATIONS.

1. The validity of a contract of a municipal corporation which can be performed only by a resort to taxation depends upon the power of such corporation to levy and collect a tax for that purpose. *Manning v. Devils Lake*, 47.
2. Cities cannot tax to build a bridge not located upon a street or highway having a legal existence. *Manning v. Devils Lake*, 47.
3. Incidental and indirect benefits to inhabitants from development of commercial interests, will not sustain the power of taxation. *Manning v. Devils Lake*, 47.
4. A city is not liable for fees of an attorney other than its city attorney, when his employment is not authorized or ratified by a ye and nay vote of its council. *Bosard v. Grand Forks*, 587.

NEGLIGENCE. See **HIGHWAYS**, 117; **EVIDENCE**, 432; **MASTER AND SERVANT**, 432; **WATER AND WATERCOURSES**, 458.

1. Failure to give statutory signals, and running the train at too rapid a rate of speed, does not excuse negligence on the part of one in charge of a team killed at a railroad crossing. *West v. N. P. Ry. Co.*, 221.

NEGOTIABLE INSTRUMENTS. See **NOTARY PUBLIC**, 363.

1. A negotiable promissory note void in the hands of the payee, a foreign corporation, which has not complied with the laws of the state as to doing business therein, may be enforced by a bona fide purchaser for value, before maturity, ignorant of the facts rendering it void in the hands of the payee, notwithstanding section 3265, Rev. Codes 1899. *Bank v. Pick*, 74.
2. The word "assign" as used in section 3265, Rev. Codes 1899, does not include the indorsee of negotiable paper, who takes the same before maturity, for value, and without notice of defense thereto. *Bank v. Pick*, 74.
3. Where a promissory note expresses on its face that it is payable at a certain store, a presentment of such note at such store for payment on the day of its maturity is a proper place for presentment to charge the indorser. *Nelson v. Grondahl*, 363.

NEGOTIABLE INSTRUMENTS—Continued.

4. Oral testimony is admissible to show facts occurring on the presentment of a note for payment, which are not stated in the notary public's certificate of presentment. *Nelson v. Grondahl*, 363.
5. Presentment at the place specified therein for its payment, no personal demand upon the maker is necessary. *Nelson v. Grondahl*, 363.
6. A memorandum on the back of a note to the effect that, if not paid at maker's death payee should expend the amount due in certain acts after maker's death; held, the memorandum was no defense to the note although executed, as it was a testamentary disposal of property without a will. *Moore v. Weston*, 574.

NEW TRIAL. See **JURY**, 361; **APPEAL AND ERROR**, 430.

1. Where a witness not subpoenaed, but who promised to attend the trial, fails to attend owing to sickness, such sickness becoming known to defendant during the trial, his failure to attend is not ground for granting a new trial, under subdivision 3 of section 5472, Rev. Codes 899, making "accident or surprise which ordinary prudence could not have guarded against," a ground for a new trial, when no motion for a continuance was made after the witness' sickness became known to defendant. *Josephson v. Sigfusson*, 312.
2. The failure of one attorney to notify another when a case will be called, if an agreement to do so is made, will not be a ground for a new trial, unless the attorney to be notified has used diligence to attend after learning from other reliable sources when the case is to be called. *Josephson v. Sigfusson*, 312.
3. An order granting a new trial will not be reversed because the trial judge assigned a wrong reason for it. *Davis v. Jacobson*, 430.
4. Where the motion for a new trial is made in part upon the court's minutes, the order made thereon cannot be reviewed in the absence of a statement of the case embodying the evidence and proceedings essential to a review. *Davis v. Jacobson*, 430.

NOTARY PUBLIC. See **NEGOTIABLE INSTRUMENTS**, 363.

1. Oral testimony is admissible to show facts occurring on a presentment of a note for payment which are not stated in the notary public's certificate of presentment. *Nelson v. Grondahl*, 363.
2. A notary public's testimony that he invariably presented notes for payment at the place where they were made payable, is admissible to establish the place of presentment, where the notary's certificate of protest fails to show the place of presentment and the notary has no independent recollection of the specific presentment evidenced by this certificate. *Nelson v. Grondahl*, 363.

NOTICE. See TAXATION, 288; CHATTEL MORTGAGES, 580.

1. Service of notice of expiration of redemption from tax sale judgment, and the filing of proof thereof, is essential to terminate redemption period. *Darling v. Purcell*, 288.
2. One who receives conveyance before notice of defect of title but pays purchase price thereafter, is not a bona fide purchaser for value. *Halloran v. Holmes*, 411.

NUISANCE. See INTOXICATING LIQUORS, 58.

1. A complaint in justice court charging a person with keeping and maintaining a nuisance "in a certain one story frame building" in a certain village and county, is a sufficient description upon which to base a preliminary examination. *State v. Wisnewski*, 649.

OBJECTIONS. See TRIAL, 319; EVIDENCE, 411.

1. Objection must be made to a question when it is asked; motion to strike out the answer when unfavorable to the objector will not be permitted. *Hogan v. Klabo*, 319.
2. Objections to evidence on the ground of variance must be supported by proof that the objector was misled to his prejudice. *Halloran v. Holmes*, 411.

OFFER OF PERFORMANCE. See TENDER, 167.

OFFICERS. See MANDAMUS, 211; AUDITOR, 351; TAXATION, 351; COUNTY COMMISSIONERS, 610.

OPINION EVIDENCE. See EVIDENCE, 432.

OPTIONS. See GAMING, 639.

PAROL EVIDENCE. See EVIDENCE, 157.

PARTIES. See CONTRACTS, 176.

1. All parties to a joint contract should be made defendants in an action to enforce it. *Clements v. Miller*, 176.

PARTNERSHIP. See CONTRACTS, 176.

1. The obligations assumed by parties to a joint contract of hiring are the same as those assumed by partners in a contract of a similar nature, and are joint obligations. *Clements v. Miller*, 176.

POSSESSION. See VENDOR AND PURCHASER, 167.

PERFORMANCE, OFFER OF. See TENDER, 167, 467.

PERSONAL PROPERTY. See PRINCIPAL AND AGENT, 453; DAMAGES, 516.

PLEADING.

1. Under prayer for general relief, in an action for specific performance, the court may order redeeding of the property sold, or a cancellation of the deed given, where the fulfillment is delayed until the real inducement on the part of the seller has failed. *Block v. Donovan*, 1.
2. Where mortgagor, under a chattel mortgage, upon a stock of merchandise, continues the business under a contract with the mortgagee, as his agent, under the terms of which he is to make purchases to replenish the stock, makes such purchases, the mortgagee is liable as an undisclosed principal, and it was error to dismiss the case on the ground that the complaint failed to state a cause of action. *Patrick & Co. v. Grand Forks Mer. Co.*, 12.
3. To authorize an injunction pendente lite under subdivision 1, section 5344, Rev. Codes 1899, the complaint must exhibit a right to a judgment of injunction, and contain a prayer that the defendant be restrained from the commission or continuance of the act complained of, which commission and continuance would injure the plaintiff. *McClure v. Hunnewell*, 84.
4. A defect in a complaint for a judgment of injunction cannot be supplied by affidavit. *McClure v. Hunnewell*, 84.
5. From facts in the opinion, from which it appears that the complaint was amended three times during the trial, it was not error to refuse request for leave to further amend after the trial. *Conrad v. Adler*, 199.
6. Where in an action one relies upon special circumstances attending the execution of a contract to show that other than the ordinary liability was contemplated, it is necessary to allege and prove them, otherwise the contract will be considered as having been made with reference to only such liabilities as would follow the breach. *Hayes v. Cooley*, 204.
7. Under a statute which permits a defendant to plead as a counterclaim "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim," does not authorize one slander to be set up against another, although both are uttered at the same time and place, and in the same conversation. *Wrege v. Jones*, 267.
8. Under our statute, a defendant in an action for slander or libel may answer by way of justification and mitigation—either or both—and may plead mitigating circumstances in connection with a general denial. *Wrege v. Jones*, 267.
9. New matter constituting a defense or counterclaim must be set forth in the answer to admit of evidence of it. The new matter of the code admits that all material allegations of the complaint are true, and consists of facts not alleged therein which destroy the right of action and defeat a recovery. *Hogen v. Klabo*, 319.

PLEADING—Continued.

10. The distinction between defenses admissible under a denial and those which are new matter, depend primarily upon the structure of the complaint and the material averment of facts therein. All facts which directly tend to disprove any one or more of the averments, or to show that the plaintiff never had a cause of action, may be offered under a general denial. *Hogen v. Klabo*, 319.
11. In an equitable action to set aside a tax sale or cancel a levy, complaint must show a tender. *Douglas v. Fargo*, 467.
12. An answer or counterclaim alleging that a written contract of sale of drills or disks provided that they were of a proper pattern and properly constructed to do the work intended for them in a certain locality, where the vendees were engaged in business, which contract is alleged to have been entered into in reliance on such statements or representations fraudulently made, does not state a defense or counterclaim, for fraud or deceit. *Dowagiac Mfg. Co. v. Mahon*, 516.
13. Where the language of an alleged libel is fairly susceptible of a construction which renders it defamatory, and therefore actionable, even though it is susceptible of a construction which would render it innocent, the complaint states a cause of action, and the jury is to determine whether the words were used in an innocent or defamatory sense. *Lauder v. Jones*, 525.
14. The truth of alleged defamatory matter and facts in mitigation, to be available as a defense, must be pleaded, or they cannot be proven. *Lauder v. Jones*, 525.
15. Complaint construed and held to charge intentional injury, and not an injury resulting from negligence. *Morrison v. Lee*, 591.
16. Upon objection to the sufficiency of the complaint after a witness is sworn, it will be liberally construed and all reasonable inferences indulged to sustain the pleading. *Waldner v. Bank*, 604.
17. Complaint, upon objection after a witness is sworn, although it fails to allege that payments were knowingly made and received, states a cause of action for recovery of usury. *Waldner v. Bank*, 604.

PRACTICE. See TRIAL, 319; JUDGMENT, 74; CONTEMPT, 85.

1. Service of notice of appeal may be made upon the adverse party by serving the same upon the attorney who appeared for him upon the trial of the action. *Bank v. Pick*, 74.
2. Service of notice of appeal upon one of a firm of attorneys of record is sufficient. *Bank v. Pick*, 74.
3. Service of notice of appeal upon the clerk of the district court is unnecessary; the filing of the notice of appeal in his office is sufficient under section 5606, Rev. Codes 1899, and no further service upon him is necessary. *Bank v. Pick*, 74.

PRACTICE—Continued.

4. It is not necessary that the notice of appeal be filed in the office of the clerk of the district court where the order appealed from is entered before the same is served, and a delay of ten days between the service and filing of the notice of appeal will not defeat the appeal, providing all acts necessary are done within the time limited to perfect the appeal. *Bank v. Pick*, 74.
5. Section 5605, Rev. Codes 1899, prescribing the time for appeals from judgment and orders, grants a full period of sixty days after written notice thereof in which to appeal from orders. *King v. Hanson*, 86.
6. Permitting leading questions and limiting cross examination rests largely in the discretion of the court, and its action is disturbed only for manifest abuse. *Josephson v. Sigfusson*, 313.
7. Objection must be made to a question when it is asked, and not taken by a motion to strike out after the answer is given. *Hogen v. Klabo*, 319.
8. A cross examination is proper though it calls for facts not testified to in the examination in chief, but relates to the same subject matter, and bears upon the main fact toward which the direct examination was directed. *Hogen v. Klabo*, 319.
9. The trial court did not abuse its discretion in vacating a default judgment where the default was in the service of an answer, and for but one day, and arose from a mistake as to the date of service of the summons and complaint, and the defendant moved promptly for relief. *Braseth v. Bottineau Co.*, 344.
10. Under the practice established in this state it is necessary that a motion to vacate a default judgment shall be accompanied by an affidavit of merits, and good practice also requires a verified answer. But the latter is not indispensable when the defense is stated in the affidavit of merits. *Braseth v. Bottineau*, 344.
11. Where an affidavit of merits, made by the state's attorney on behalf of his county, and as its attorney in the action, states that the defendant has a good and sufficient defense, as shown by its answer, which is attached to and made a part thereof, it is sufficient as an affidavit of merits, and will sustain the order vacating the judgment. *Braseth v. Bottineau Co.*, 344.
12. It is the correctness of an order, not the grounds assigned for it, that will be reviewed. *Davis v. Jacobson*, 430.
13. Where the motion for a new trial is made in part upon the court's minutes, the order granting or denying it cannot be reviewed without a statement of the case embodying portions of the proceedings necessary to a review of the matter not upon the minutes. *Davis v. Jacobson*, 430.

PRACTICE—Continued.

14. The disease which it is claimed the assured had when the first premium was paid, and from which he died, was not known to the attending physician or others until disclosed by proofs of his death. Under these circumstances, the admission of, and subsequent refusal to strike out, testimony to the effect that neither the assurer nor its agents returned or offered to return the premium, and that it made no inquiry as to the assured's health when the premium was paid, was prejudicial error for which a new trial should have been granted. *Thompson v. Travelers' Insurance Co.*, 444.
15. Where the client of an attorney, who has been committed during the progress of a trial, wishes to urge such action as an irregularity and an abuse of discretion, depriving such client of a fair trial, he must make application by affidavit under section 5473, Rev. Codes 1899. *King v. Hanson*, 85.
16. An affidavit for continuance on the ground of the absence of a material witness, which states that the affiant is informed and believes that the absent witness can and will testify to certain facts, but fails to disclose the source of his information and grounds for his belief, is insufficient. *State v. Currie*, 383.
17. The denial of a motion to direct a verdict is not available as error when further testimony is introduced and the motion is not renewed. *Ward & Murray v. McQueen*, 153.

PRELIMINARY EXAMINATION. See CRIMINAL LAW, 368, 494, 649.

1. Where a complaint in justice court charges the keeping of a nuisance "in a certain one story frame building," in a certain village and county, without specifying the lot or block, the description is sufficient on a preliminary examination for that offense. *State v. Wisniewski*, 649.

PRESUMPTIONS. See EVIDENCE, 1, 257, 267, 525.

PRINCIPAL AND AGENT.

1. Undisclosed principal liable for agent's purchases when discovered. *Patrick & Co. v. Grand Forks Mer. Co.*, 12.
2. A general agent of a machine company, whose authority is not in writing, is a competent witness as to what authority he has. *Reeves & Co. v. Bruening*, 157.
3. Under section 4343, subdivision 2, Rev. Codes 1899, one who, without authority, executes a written contract in the name of his principal, without believing in good faith that he has authority to do so, is responsible as principal to third persons for his acts in the course of his assumed agency; and an action is maintainable against him upon the contract, as principal therein, and for its breach. *Kennedy v. Stonehouse*, 232.

PRINCIPAL AND AGENT—Continued.

4. Under section 4995, Rev. Codes 1899, one injured by the breach of an agent's warranty of authority may recover damages therefor in "the amount which could have been recovered and collected from his principal if the warranty had been complied with," and in addition thereto, "the reasonable expenses of legal proceedings taken in good faith to enforce the act of the agent against his principal." *Kennedy v. Stonehouse*, 232.
5. Where a contract provides that "settlements of accounts governed by it are to be consummated only by written approval of said party of the first part from its home office," a settlement made by an agent duly authorized to make a settlement under such a contract in a particular case—such settlement being duly executed—is binding upon the principal, and it will not be heard thereafter to repudiate such settlement, although not approved in writing. *Dowagiac Mfg. Co. v. Hellekson*, 257.
6. Where a principal retains money paid on a settlement, with knowledge of all the facts pertaining to such settlement, it is a ratification of such settlement, although made by an agent without authority to make final settlements. *Dowagiac Mfg. Co. v. Hellekson*, 257.
7. Agent purchasing his principal's land must disclose all facts regarding its value or the conveyance is voidable. *Van Dusen v. Bigelow*, 277.
8. Personal property bought by an agent for his principal, with the principal's money, cannot be sold to a third person, although an innocent purchaser, so as to convey title thereto as against the principal, unless such principal has estopped himself by his act or conduct from asserting his ownership of such property. *Gussner v. Hawks*, 453.
9. An agency to carry out the provisions of a memorandum on the back of a note after the maker's death, never became operative as it was revoked by the maker's death. *Moore v. Weston*, 574.

PRINCIPAL AND SURETY.

1. Where a surety pays a debt secured by a chattel mortgage he becomes vested with title to the note representing the debt and the chattel mortgage securing the same, and he may sue for a conversion of the mortgaged property. *Thurston v. Osborne-McMillan Co.*, 508.

PROCESS. See SUMMONS, 182, 305.

1. Jurisdiction rests upon the fact, not the proof of, service of process. *Cruser v. Williams*, 284.
2. Appearance makes void service of summons valid. *Simenson v. Simenson*, 305.

PROMISSORY NOTES. See NEGOTIABLE INSTRUMENTS, 74.

QUIETING TITLE.

1. A judgment establishing the validity of a mortgage rendered in an action to quiet title is not available as *res adjudicata* against a plea of the statute of limitations, interposed in a subsequent action between the same parties to foreclose the same mortgage, where it does not appear that the conditions were such that the statute of limitations could have been pleaded. *Teigen v. Drake*, 502.

RAILROADS. See MASTER AND SERVANT, 433.

1. Failure to give statutory signals and running the train at too rapid a rate of speed, does not excuse negligence on the part of one in charge of a team killed at a railroad crossing. *West v. N. P. Ry. Co.*, 221.

RATIFICATION. See TAXATION, 284, 288; CHATTEL MORTGAGE, 580.

RECEIVER. See CORPORATIONS, 396.

1. It is an abuse of discretion to enjoin the foreclosure of a lien upon the property of a corporation, or restrain a pending action, without first appointing a receiver to preserve such property. *Marshall-Wells Hardware Co. v. New Era Coal Co.*, 396.

REDEMPTION. See TAXATION, 284, 288; CHATTEL MORTGAGES, 580.

REFORMATION OF INSTRUMENTS.

1. Where a writing as a whole does not purport to be a contract between two or more persons, but recites a dealing of the signer with himself, equity will not, upon parol proof, compel the signature of a party who owns the land described therein, and decree a specific performance of the writing as so reformed. *Kaster v. Mason*, 107.

REMOVAL FROM OFFICE. See MANDAMUS, 211.

RES ADJUDICATA.

1. Unless it appears that a defense was pleadable in a former action, a judgment rendered therein is not available as *res adjudicata* against a plea of the statute of limitations in another action. *Teigen v. Drake*, 502.

RES GESTAE. See EVIDENCE, 559, 629.

RESIDENCE. See HOMESTEAD, 167.

REVOCATION. See CONTRACTS, 157.

ROBBERY. See CRIMINAL LAW, 494.

SALES. See **CONTRACTS**, 157; **TAXATION**, 288; **SHERIFF AND CONSTABLES**, 426.

1. Where a written contract of sale specifies the terms under which delivery shall be made, delivery is not shown as a matter of law by pointing out the property in a deliverable condition, nothing being said or done to show a waiver of some of the conditions under which delivery was to be made and the title was to pass. *Reeves & Co. v. Bruening*, 157.
2. The intention of the parties at the time that delivery is claimed to have been made determines whether it was made or not. *Reeves & Co. v. Bruening*, 157.
3. Personal property, bought by an agent for his principal, with his principal's money, cannot be sold to a third person, although an innocent purchaser, so as to convey title thereto as against the principal, unless such principal has estopped himself by his act or conduct from asserting his ownership of such property. *Gussner v. Hawks*, 453.
4. A written warranty that "it is understood that the goods are warranted only against breakage caused by manifest defects in material," etc., excludes all other warranties of quality, express or implied. *Dowagiac Mfg. Co. v. Mahon*, 516.
5. Under a written contract of sale of machinery, specifying the terms and conditions of the contract, a sale by sample cannot be shown. *Dowagiac Mfg. Co. v. Mahon*, 516.

SENTENCE.

1. Where a sentence is excessive the Supreme Court may modify it under section 8350, Rev. Codes 1899. *State v. Wisniewski*, 649.

SHERIFFS AND CONSTABLES, See **TAXATION**, 284.

1. Under chapter 67, p. 78, Laws 1897, until the right of redemption from tax judgment is eliminated, sheriff's certificate is evidence of a lien only. *Cruser v. Williams*, 284.
2. The sale by a sheriff under execution of real estate which is exempt as a homestead, conveys no estate or title to the purchaser, and the officer making such sale is not liable to the owner in an action for damages, except, perhaps for costs incurred in removing an apparent cloud upon the title. *Johnson v. Twichell*, 226.

SLANDER AND LIBEL.

1. Subdivision 1 of section 5274, Rev. Codes 1899, which permits a defendant to plead as a counterclaim "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim," does not authorize one slander to be set up against another, although both are uttered at the same time and place, and in the same conversation. Each slander constitutes a separate transaction, within the meaning of the above section. *Wrege v. Jones*, 267.

SLANDER AND LIBEL—Continued.

2. Under our statute, a defendant in an action for slander or libel may answer by way of justification and mitigation—either or both—and may plead mitigating circumstances in connection with a general denial. *Wrege v. Jones*, 267.
3. Where words are spoken which are slanderous per se, malice is conclusively presumed, for the purpose of recovering actual damages. The malice which by legal fiction is thus presumed to exist is malice in law, or legal malice, as distinguished from malice in fact, or actual malice. *Wrege v. Jones*, 267.
4. In an action for slander and libel, the right to recover punitive damages depends upon the presence of actual malice, and, where such damages are claimed, the presence or absence of actual malice, and its degree, is a vital and material question. In such cases the defendant may, under a sufficient answer, testify directly to his intent or motive, and also as to facts and circumstances which were within his knowledge and relied upon by him, which tend to characterize his motive. In this case the defendant under a plea in mitigation, offered evidence as to his motive in speaking the slanderous words, which he is charged with uttering, and also as to the facts and circumstances which prompted their utterance. Held, that the exclusion of this evidence was prejudicial error. *Wrege v. Jones*, 267.
5. When the language claimed to be libelous is susceptible of two constructions, the jury are to determine whether they are used in an innocent or defamatory sense. *Lauder v. Jones*, 525.
6. The defamatory charge need not be made in direct terms; it is no less actionable if made indirectly. *Lauder v. Jones*, 525.
7. Every false and unprivileged publication by writing "which exposes a person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided * * *" is libelous and actionable. *Lauder v. Jones*, 525.
8. A writing is defamatory and actionable when it charges: (1), that plaintiff wilfully refused to perform a legal duty, and that such refusal was from corrupt motives; (2), that the plaintiff betrayed confidential communications to an alleged criminal for the purpose of shielding him; (3), and by insinuation that the plaintiff was privy to a corrupt agreement, whereby, for a money consideration, protection was extended to law violators. *Lauder v. Jones*, 525.
9. The defendant, under section 5289, Rev. Codes 1899, in a libel case, can plead as a complete defense, the truth of the alleged defamatory charge, and any mitigating circumstances to reduce the amount of damages, "and whether he prove the justification or not he may give in evidence the mitigating circumstances." *Lauder v. Jones*, 525.
10. The truth of the alleged defamatory matter and facts in mitigation must be pleaded, and unless so pleaded cannot be proven. *Lauder v. Jones*, 525.

SLANDER AND LIBEL—Continued.

11. In a case where punitive as well as compensatory damages are allowable, \$7,000 is not an excessive award of damages. *Lauder v. Jones*, 525.
12. When a defamatory charge is made upon an unprivileged occasion, the law implies malice, but when the occasion is privileged the publication is presumed in good faith, and the burden is on the plaintiff to prove actual malice. *Lauder v. Jones*, 525.
13. Former utterances on the same subject matter, but not a distinct calumny, may be offered to prove malice. *Lauder v. Jones*, 525.
14. Matter which is pertinent to the issues, uttered in judicial proceedings, is privileged. *Lauder v. Jones*, 525.
15. The occasion being privileged, the law presumes that the statements of the witness are made in good faith and without malice. *Lauder v. Jones*, 525.
16. It was error to admit an affidavit used in a proceeding in the Supreme Court, because (1) the statements contained in it do not relate to the subject matter of the alleged libel; (2) they were privileged and presumed to be made in good faith. *Lauder v. Jones*, 525.
17. The falsity of a defamatory charge is always presumed, and the defendant who relies upon the truth as a defense must plead it, even when the defamatory statements are made upon privileged occasions. *Lauder v. Jones*, 525.

SPECIAL PROCEEDINGS.

1. The procedure to obtain an order against the foreclosure of a mortgage by advertisement, under section 5845, Rev. Codes 1899, is not a special proceeding within the meaning of the code. *Tracy v. Scott*, 577.

SPECIFIC PERFORMANCE. See EQUITY, 1; PLEADING, 1.

1. In an action for specific performance a court can order redeeding of real estate, or cancel a deed given, where fulfilment of contract by purchaser is delayed until real inducement on part of seller has failed. *Block v. Donovan*, 1.
2. Where the court ordered specific performance within thirty days, and at the end thereof ordered cancellation of contract and deed, such order will be presumed to be based upon competent evidence. *Block v. Donovan*, 1.
3. Equity will not decree specific performance of a writing which lacks two essential elements of a contract, viz., consideration and mutual assent of the signers to all the terms of the writing. *Kaster v. Mason*, 107.

STATE'S ATTORNEY. See PRACTICE, 344.

STATEMENT OF THE CASE. See APPEAL AND ERROR, 182, 359, 430, 664.

1. A motion for a new trial in part upon the court's minutes, cannot be reviewed without a statement of the case embodying the evidence and proceedings essential to a review. *Davis v. Jacobson*, 430.
2. Facts essential to a review, not otherwise appearing in the record, must be brought into it by a statement of the case. *State v. Scholfield*, 664.

STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS, 232.

STATUTES.

1. Under section 5630, plaintiff will not be heard to assert that the action is in fact one of forcible entry and detainer, and that the question of title and possession cannot be investigated in the Supreme Court, when he has submitted the cause to the district court and has tried it there upon that theory. *Fifer v. Fifer*, 20.
2. Under section 7605, Rev. Codes 1899, for the abatement of a liquor nuisance, no proceeding in rem against the liquors is authorized. *State v. McMaster*, 58.
3. In proceedings under said section, an action is abated by the death of the only defendant served with summons, or appearing therein. *State v. McMaster*, 58.
4. Under chapter 63, Rev. Codes 1899, intoxicating liquors are recognized as property. *State v. McMaster*, 58.
5. Under section 7605, Rev. Codes 1899, intoxicating liquors can be destroyed only when the nuisance is shown to have been maintained by a party defendant, and the owner or keeper, in the pending action. *State v. McMaster*, 58.
6. In an action under section 7605, for the abatement of liquor nuisance, an injunction may issue upon the complaint alone, when verified by the state's attorney, upon information and belief. *State v. Register, et al*, 70.
7. An affidavit, upon information and belief alone, is insufficient to give the court jurisdiction to issue a search warrant under section 7605, Rev. Codes 1899. *State v. Patterson et al*, 70.
8. The filing of a notice of appeal from the district court in the office of its clerk is sufficient notice to him under section 5606, Rev. Codes 1899. *Bank of Commerce v. Pick*, 74.
9. Notwithstanding section 3265, Rev. Codes 1899, a negotiable promissory note may be enforced in the hands of a bona fide purchaser for value without notice, although void in the hands of a foreign corporation for its failure to comply with the laws of this state as to foreign corporations. *Bank v. Pick*, 74.
10. The word assign, as used in section 3265, Rev. Codes 1899, does not embrace a bona fide indorsee for value without notice. *Bank v. Pick*, 74.

STATUTES—Continued.

11. Under section 5344, Rev. Codes 1899, to authorize an injunction pendente lite, the complaint must show a right to a judgment of injunction. *McClure v. Hunnewell*, 84.
12. Under the statutes of this state, an appeal from an order taken within the time allowed by law may be had after the time for an appeal from a judgment has expired, provided the appeal is taken within the statutory period. *King v. Hanson*, 87.
13. Under section 5474, Rev. Codes 1899, when a client desires to urge the commitment of his attorney for contempt during the trial, the application must be upon affidavit. *King v. Hanson*, 86.
14. Under section 7605, relating to a nuisance and enumerating the things forbidden in the building alleged to contain it, it is not the doing of such things that constitutes the nuisance, but the keeping of the building where such things are done. *State v. Nelson et al*, 122.
15. The word "place" as used in section 7605, Rev. Codes, 1899, means the particular room, tenement or apartment where the prohibited business is done, or liquor is kept for sale or sold. *State v. Nelson et al*, 122.
16. The finding of intoxicants is evidence, under section 7605, Rev. Codes 1899, only when found by an officer with proper process. *State v. Nelson*, 122.
17. In an equitable action to abate a liquor nuisance, under section 7605, Rev. Codes 1899, the finding of liquors in the defendant's possession is not, under section 7614 of said codes, presumptive evidence that the same was kept for sale contrary to law. *State v. Nelson*, 123.
18. Section 8122, Rev. Codes 1899, providing for change of venue at the instance of the state's attorney, merely perpetuates the right of trial by jury as known at the adoption of the constitution and at common law, and does not violate that right secured by section 7 of the state constitution. *Barry v. Traux*, 131.
19. A temporary injunction may be issued in a civil action when one of the several conditions enumerated in section 5344, Rev. Codes 1899, is shown to exist, but only when it shall appear by the complaint that the plaintiff is entitled to the relief demanded. *Burton v. Walker*, 149.
20. Section 5630 gives the appellant alone, not the respondent, the right to specify questions of fact for review upon appeal. *Salemonson v. Thompson*, 182.
21. A question of fact specified for review under section 5630, Rev. Codes 1899, must be sufficiently definite to enable the respondents to determine, for purposes of amendment, what evidence to embody in a statement of the case. *Salemonson v. Thompson*, 182.
22. A fraudulent transfer of property under section 5052, Rev. Codes 1899, as between the parties, is valid, but as to creditors, void at their election. *Salemonson v. Thompson*, 182.

STATUTES—Continued.

23. In actions of ejectment, or to determine adverse claims under section 5904, Rev. Codes 1899, the plaintiff must recover upon the strength of his own, not the weakness of the defendant's, title. *Conrad v. Adler*, 199.
24. The rule for measuring damages under section 4978, Rev. Codes 1899, for breach of contract, is the same as at common law, namely, the compensation for the detriment proximately and naturally caused by the breach. *Hayes v. Cooley*, 204.
25. In an action upon the relation of the attorney general, to remove a sheriff for malfeasance, founded upon section 5743, Rev. Codes 1899, wherein, under section 363, Rev. Codes 1899, was made a motion to suspend such sheriff pending the trial, wherein the district court decided that it was without jurisdiction to suspend or to try him in the form of action before it, and dismissed it, such determination was a judicial one, and can be reviewed by appeal alone, not in mandamus proceedings in the supreme court. *State v. District Court*, 211.
26. Under section 4343, Rev. Codes 1899, one who, without authority, executes a contract in writing in the name of his principal, without believing in good faith that he has authority to do so, is responsible as principal to third persons for his acts in the course of his assumed agency; and an action is maintainable against him as principal upon the contract, and for its breach. *Kennedy v. Stonehouse*, 232.
27. Under section 4995, Rev. Codes 1899, one injured by a breach of agent's warranty of authority may recover damages therefor in "the amount which could have been recovered and collected from his principal if the warranty had been fulfilled," and in addition thereto, "the reasonable expenses of legal proceedings taken in good faith to enforce the act of the agent against his principal." *Kennedy v. Stonehouse*, 232.
28. Chapter 161, page 213, Laws 1903, confers upon the several boards of county commissioners administrative, not legislative, discretion, and is not vulnerable to the attack that it delegates legislative authority to said boards. *Picton v. Cass County*, 242.
29. Subdivision 1 of section 5274, Rev. Codes 1899, does not authorize one slander to be set off against another, as a counterclaim, although uttered at the same time. Within the meaning of such section, each slander is a separate transaction. *Wrege v. Jones*, 267.
30. Under our statutes, section 5289, Rev. Codes 1899, a defendant in an action for slander or libel may answer by way of justification and mitigation—either or both—and may plead mitigating circumstances in connection with a general denial. *Wrege v. Jones*, 267.

STATUTES—Continued.

31. Section 4 of chapter 67, page 78, Laws of 1897, for the enforcement of taxes by judgment and sale, requires the publication of a notice and list and the filing of the affidavit of publication with the clerk; held, that the evidence does not overcome the presumption that such affidavit was filed, and that jurisdiction was given by the fact of the publication, and not the filing of the affidavit. *Darling v. Purcell*, 288.
32. This act, Laws 1897, page 79, chapter 67, section 6, makes it the duty of the clerk, in default of answer, to enter judgment of the amount of the tax, penalty and interest stated in the list, and the fact that the county treasurer made an error in computing and stating the amount of interest and penalty did not affect the jurisdiction of the court to enter judgment for the amount stated. *Darling v. Angell*, 288.
33. All sales are subject to redemption under chapter 67, page 76, Laws of 1897, and the certificate of sale is the only muniment of title issued by the county, and the title passes by the operation of law at the end of the period of redemption and not before. *Darling v. Purcell*, 288.
34. Section 19 of Laws of 1897, page 86, chapter 67, gives the county treasurer authority to assign certificates held by the county upon payment of the amount due thereon, with all subsequent taxes, penalties and interest. Payment of the amount due at the delivery of the assignment is not essential to its validity, but upon payment at a later date the assignment becomes effective and valid. *Darling v. Purcell et al.*, 288.
35. Where a witness not subpoenaed, but who promised to attend, fails to attend the trial, owing to sickness, such sickness being known to the defendant during the trial, his failure to attend is not ground for granting a new trial under subdivision 3 of section 7472, Rev. Codes 1899, making "accident or surprise which ordinary prudence could not have guarded against," a ground for a new trial, when no motion was made for a continuance after the witness' sickness became known to the defendant. *Josephson v. Sigfusson*, 312.
36. Under chapter 67, page 76, Laws 1897, the jurisdiction of the court to enter judgment against a particular tract appearing on the list filed with clerk as unpaid, is not affected by the fact that all the taxes against the owner and against the tract had been previously paid. *Purcell v. Farm Land Co.*, 327.
37. The information, charging the offense of attempting to shoot with intent to kill, under section 7115, Rev. Codes 1899, although not in the language of the statute, is sufficient. *State v. Cruikshank*, 337.
38. Sections 7115 and 7145, Rev. Codes 1899, construed, and held, that the class of acts described as "assault and battery," with any deadly weapon, etc., in section 7115, and by the term "assault or assault and battery," with any sharp and dangerous weapon, in section 7145, does not include an assault or assault and battery with firm arms with the purpose of shooting. *State v. Cruikshank*, 337.

STATUTES—Continued.

39. A verdict finding a defendant guilty of "assault with a dangerous weapon with the intent to do bodily harm," does not warrant a judgment and sentence for a felony defined in section 7145, Rev. Codes 1899, as an attempt to shoot with intent to do bodily harm. *State v. Cruikshank*, 337.
40. Lands bid in for the state at a tax sale under chapter 132, page 376, Laws of 1890, and not redeemed or assigned within three years from such sale, become forfeited lands, and thereafter not subject to sale for taxes while they remain forfeited lands. *Patton v. Cass County*, 351.
41. Lands bid in for the state under chapter 132, page 376, Laws of 1890, and becoming forfeited lands in 1893, cannot be lawfully sold for taxes attempted to be levied thereon in 1896, after becoming delinquent in 1897. *Patton v. Cass County*, 351.
42. An action at law for the recovery of money only, tried since the taking effect of chapter 201, page 277, Laws of 1903, is not triable in the district court under the provisions of section 5630, Rev. Codes 1899, as amended, and hence cannot be tried de novo on appeal. *Barnum v. Gorham Land Co.*, 359.
43. A statement of the case which shows that a law action triable to a jury as a matter of right, was tried to the court without a jury, under section 5630, Rev. Codes 1899, over defendant's objection, and a jury was not waived, presents a mistrial, which requires the reversal of the judgment and a new trial. *Hanson v. Carlblom*, 361.
44. When the accused has given bail and fails to appear at a preliminary examination, but is represented by his counsel, he cannot object to the proceedings had against him in his absence, as in violation of section 7960, Rev. Codes 1899, which provides that the witnesses upon a preliminary examination must be examined in the presence of the accused. *State ex rel Poul v. McLain*, 369.
45. Under section 3936, Rev. Codes 1899, providing that a contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise, "it cannot be modified by an unexecuted oral agreement, although the modification pertains to performance of the contract." *Coughan v. Larson*, 373.
46. In bastardy proceedings, when the defendant furnishes bail, approved by the magistrate under section 7842, Rev. Codes 1899, it is not necessary that the transcript of the proceedings show any formal order holding the defendant to bail. *State v. Carroll*, 383.
47. Where one is accused of shooting or attempting to shoot, with intent to kill, or of shooting or attempting to shoot with intent to do bodily harm, under Rev. Codes 1899, sections 7115, 7145, a verdict for assault with a deadly weapon with intent to do bodily harm will warrant a sentence for assault only. *State v. Mattison et al.*, 391.

STATUTES—Continued.

48. A creditor whose claim has not been reduced to judgment may maintain an action against an insolvent corporation on behalf of himself and all other creditors, to enforce stockholders' liability as defined by section 2902, Rev. Codes 1899, Sections 5767-5770, authorize such action.
49. Section 5773, Rev. Codes 1899, authorizes an injunction prohibiting creditors from proceeding with actions against an insolvent corporation where the creditor has brought an action under section 5767-5770. *Marshall-Wells Hardware Co. v. New Era Coal Co.*, 396.
50. Section 491, Rev. Codes 1899, which prohibits the printing of the name of a candidate for office in more than one column of the official ballot, is, as to a candidate who is the nominee of a single political party and the nominee of electors by petition, a reasonable regulation of the manner of exercising the right of suffrage, and is valid and constitutional. *State v. Porter*, 406.
51. Sections 1640, 1643, Comp. Laws 1887, authorizing the court to render judgment for the taxes due, in lieu of tender, were repealed in 1897 (Laws of 1897, page 297, chapter 126, section 110), and no substitute therefor has been enacted. *Douglas v. Fargo*, 465.
52. An information for the crime of robbery, as defined in section 7117, Rev. Codes 1899, is sufficient to charge the taking with intent to steal the property taken when it charges that the defendant "unlawfully, wrongfully and feloniously * * * did take and carry away," etc. *State v. Fordham*, 494.
53. A mortgage contained a power of sale, but the defendant had procured an order under section 5845, Rev. Codes 1899, enjoining a foreclosure thereunder. Held, that the defendant was not thereby estopped to plead the statute of limitations in bar of an action to foreclose. *Teigen v. Drake*, 502.
54. Section 4988, prescribing the rule of damages upon failure to accept and pay for personal property, the title to which is not vested in the vendee, is not applicable as a rule of damages where the property has been delivered to the vendee. *Dowagiac Mfg. Co. v. Mahon*, 516.
55. Under the statutes of this state (section 2715, Rev. Codes 1899), "every false and unprivileged publication by writing which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned and avoided" * * * is libelous and actionable. *Lauder v. Jones*, 525.
56. Under section 5289, truth and mitigating circumstances may be pleaded in a libel suit. *Lauder v. Jones*, 525.
57. The truth of the alleged defamatory matter, as well as facts in mitigation, are new matter, and, to be available as a defense under section 5289, Rev. Codes 1899, must be pleaded in the answer. *Lauder v. Jones*, 527.

STATUTES—Continued.

58. The procedure by which an injunction against foreclosure of a mortgage by advertisement may be obtained under section 5845, Rev. Codes 1899, is not a special proceeding within the meaning of that term as used in the Code. *Tracy v. Scott et al.*, 577.
59. A second mortgagee has the right to redeem under section 5894, Rev. Codes 1899, from a chattel mortgage sale by advertisement. *Brown v. Smith*, 580.
60. The notice of intention to redeem as provided by section 5894, Rev. Codes 1899, is served in time if served as soon after the sale as by reasonably prompt and vigorous exercise, the service can be effected. *Brown v. Smith*, 580.
61. In order to show a complete redemption under a chattel mortgage sale under section 5894, it is not sufficient to prove a tender of the amount required to redeem, and a refusal to accept; but it also must be proved that the tender was kept good by a deposit of the amount tendered, in accordance with section 3814, Rev. Codes, 1899. *Brown v. Smith*, 581.
62. Under the liberal rule of construction allowed, when objection to the complaint is made for the first time after a witness is sworn, the complaint states a cause of action for the recovery of money paid as usury pursuant to a contract, in an action under section 4066, Rev. Codes 1899, although it does not expressly allege that such payments were knowingly made and received. *Waldner v. Bank*, 604.
63. Under section 4066, Rev. Codes 1899, prescribing the amount recoverable when usurious payments have been made plaintiff may recover double the amount of all interest payments made, and not merely the excess over the lawful rate. *Waldner v. Bank*, 604.
64. Where a sentence pronounced by the district court is excessive in some respects the Supreme Court may modify the sentence under section 8350, Rev. Codes, 1899.

STATUTES CITED AND CONSTRUED.

REVISED CODES.

Section	Page	Section	Page
70	365	3862	164
363	211, 217, 218, 221	3888	163, 521
491	406	3916	382
498	408	3932	7
501	408	3936	164, 265, 373, 379
704	358	4064	609
1050	52	4066	604, 608
1053	52	4097	443
1091	52	4338	322
1114	52	4342	240
1191	475	4343	232, 240

STATUTES CITED AND CONSTRUED—Continued.

Section	Page	Section	Page
1271	246, 251	4370	180
1905	614	4394	180
1906	614	4661	512
1907	614	4693	586
1979	614	4701	34
1988	615	4810	403
2143	590	4897	636
2148	57	4978	204, 206
2185	475	4987	166
2190	482	4988	166, 517, 524
2503	57	4995	241
2715	525, 541	5012	628
2718	98	5050	197
2766	97	5052	183, 195
2767	97	5071	465
2902	396, 401	5076	465
2976	228	5082	97, 465
3230	634	5085	97, 465
3261	77, 78, 80, 81	5147	584
3263	77, 78, 80, 81	5222	81
3265	74, 81, 83	5232	180
3293	636	5234	66
3294	636	5244	115
3491a	633, 635	5272	179
3516	634	5273	323
3605	429	5274	267, 270
3608	172	5288	545
3741	69	5289	267, 273, 525, 526, 545
3766	180, 181	5292	80
3783	81	5293	416
3814	581, 586	5294	416
3856	111	5295	417
5298	348	6407	514, 515
5343	72	6408	514, 515
5344	84, 85, 149, 152	6410	515
5345	72	6443	151
5420	284	6677	24
5444	598	6771	80
5454	549	7002	203, 331, 335
5467	263, 361	7101	393
5472	106, 312, 317	7115	337, 339, 340,
5473	87, 106		341, 342, 391, 392, 394
5517	429	7117	494
5582	580	7141	341
5603	578	7142	342
5605	86, 93	7144	343

STATUTES CITED AND CONSTRUED—Continued.

Section	Page	Section	Page
5606	74, 75, 78, 80	7145	337, 339, 340, 341, 342, 391
5611	12	7594	70
5626	112, 114, 578	7605	58, 62, 66, 68, 69, 70, 71,
5630	20, 23, 63,		72, 122, 125, 127, 543, 650
	109, 171, 182, 189, 265, 279,	7610	654
	327, 331, 359, 360, 361, 362,	7614	123, 127, 652
	415, 489, 603, 622, 626, 633	7694	393
5632	578	7834	220
5696	203	7838	220, 221
5713	634	7842	383, 386
5700	297	7843	386
5732	79	7886	651
5739	45, 46	7960	369, 371
5741	217	7983	499, 652
5743	211, 217	8039	394
5761	402, 403	8040	394
5765	401	8042	394
5767	396, 401, 402	8122	131, 135, 136, 137, 138
5769	401	8191	653
5770	396, 401, 402	8256	666
5773	396, 400, 403, 405	8257	666
5779	400	8269	666
5845	503, 507, 577, 578	8273	667
5894	580, 582	8297	666
5904	199, 202	8350	649, 654
6111	218	8446	356
6405	514	8503	371
6406	515		

COMPILED LAWS.

Section	Page	Section	Page
1640	468, 477, 485	7314	138
1643	468, 476, 477, 478, 485	7315	138
5236	114	7316	138
7312	138	7317	138
7313	138	7318	138

SESSION LAWS.

Year	Chapter	Page
1875	..	138
1877	6	303
1889	198	303
1890	132	351, 352, 353, 355
1891	120	578
1897	67	256, 284, 287, 288, 289, 294, 295, 296, 297, 298

STATUTES CITED AND CONSTRUED—Continued.

Section	Page	Section	Page
1897	126	246, 354, 468, 485	
1901	5	187, 202	
1901	63	231, 441	
1901	134	50	
1901	161	256	
1903	83	358	
1903	158	485	
1903	161	246	
1903	166	485	
1903	201	359, 360	

STIPULATION. See JUDGMENT, 74; WORDS AND PHRASES, 327.

STOCKHOLDERS. See CORPORATIONS, 396.

SUMMONS. See JUDGMENT, 182.

1. A judgment rendered upon substituted service of summons and an attachment of property, to the extent of the debtor's interest in property seized, is as conclusive as one rendered upon personal service. *Salemonson v. Thompson*, 182.
2. Under the law formerly in force in this state, Comp. Codes, section 4900, an affidavit for publication of summons which fails to show that proper diligence was used to find the defendant in this state, is fatally defective, and a publication of summons based upon such affidavit confers no jurisdiction of the person of the defendant, *Simenson v. Simenson*, 305.
3. A defendant who has not been properly served with summons, who moves to vacate a default judgment entered in favor of plaintiff, upon jurisdictional grounds, but also asks permission to file an answer, thereby waives service of summons by making a general appearance. The jurisdiction over the person of such defendant is complete from date of such general appearance, but does not relate back, so as to cure void proceedings theretofore had. *Simensen v. Simenson*, 305.

SUPREME COURT. See MANDAMUS, 211; SENTENCE, 649.

TAXATION.

1. The validity of a contract of a city, which can be performed only by a resort to taxation, depends upon the power of such city to tax for such purpose. *Manning v. Devils Lake*, 47.
2. A city cannot tax to raise funds to construct a bridge not located upon a legal highway or street. *Manning v. Devils Lake*, 47.
3. The taxing power of city corporations can be exercised only for corporate purposes. *Manning v. Devils Lake*, 47.
4. Incidental and indirect benefits accruing from the development of commercial interests will not sustain the power of taxation. *Manning v. Devils Lake*, 47.

TAXATION—Continued.

5. Chapter 161, p. 213, Laws 1903, which provide for the enforcement of payment by judicial proceedings of taxes upon real property sold to the state or county, more than three years, and gives the several boards of county commissioners of all counties in the state a discretionary authority to institute proceedings therein provided for, is not vulnerable to the objection that it delegates legislative power to said boards. The act is complete and is in force in every county in the state by legislative will. The discretion committed to the boards is administrative only. *Picton v. Cass County*, 242.
6. Section 4 of chapter 67, p. 78, Laws of 1897, an act to enforce the payment of real estate taxes through the medium of a judgment and sale thereunder, requires the publication of a notice and list, the filing of an affidavit of publication with the clerk, held, on an attack upon the validity of a tax judgment (1) that the evidence does not overcome the presumption that the affidavit was filed, and (2) that jurisdiction to enter the judgment was given by the fact of publication, and not by the filing of the affidavit. *Cruser v. Williams*, 284.
7. All sales under chapter 67, p. 78, Laws of 1897, above, are subject to redemption, and until the redemption is eliminated the sheriff's certificate of sale is evidence of a lien only. *Cruser v. Williams*, 284.
8. The redemption period does not terminate, the certificate of sale mature, or title pass, until the statutory notice of the expiration of the period of redemption has been given, and proof thereof filed; and the burden of proving such service and filing is upon the person asserting title thereunder. *Cruser v. Williams*, 284.
9. The certified copy of the resolution designating paper for publication of notice under section 4, chapter 67, p. 78, Laws of 1897, required to be filed, need not bear the county seal. *Darling v. Purcell*, 288.
10. Deviations in the published list required under that law, in matters of phraseology and arrangement, not affecting the substance, nor misleading as to the facts required to be stated in the list, are not fatal to its validity. *Darling v. Purcell*, 288.
11. Error made by the county treasurer in computing the interest and penalty for the entry of a tax judgment under Laws of 1897, p. 79, chapter 67, section 6, does not affect the validity of the judgment. *Darling v. Purcell*, 288.
12. A sale under a valid tax judgment for a greater amount than is due does not render it invalid, nor will the sale be set aside upon that ground. *Darling v. Purcell*, 288.
13. All sales under chapter 67, p. 76, Laws of 1897, are subject to redemption, and the certificate of sale is the only muniment of title issued by the county, and title passes by operation of law when the period of redemption has expired, and not before. *Darling v. Purcell*, 288.

TAXATION—Continued.

14. Serving notice of the period of redemption and filing proof thereof with the clerk of the district court, is essential to terminate the redemption period; and until service is made and proof filed, certificate, whether held by an individual or a county, does not ripen into title. *Darling v. Purcell*, 288.
15. Under section 19, Laws of 1897, p. 86, chapter 67, an assignment of a certificate of tax sale made to the county by the county treasurer becomes valid when the payment to the county authorizing such assignment is in fact made, although not made until after such assignment. *Darling v. Purcell*, 288.
16. Under chapter 67, p. 76, Laws of 1897, pertaining to obtaining judgments against specific tracts of land to enforce payment of taxes against the owner, jurisdiction of the court to enter judgment against a particular tract appearing on the list filed with the clerk as unpaid is not affected by the fact that all taxes against the owner and against the tract had been previously paid. *Purcell v. Farm Land Co.*, 327.
17. Lands bid in at tax sale for the state under the revenue law of 1890, and not redeemed or assigned within three years from the sale, become forfeited lands, and are not thereafter subject to sale for taxes while they remain forfeited lands. *Patton v. Cass County*, 351.
18. Lands bid in for the state under the revenue law of 1890, and becoming forfeited lands in 1893, cannot be lawfully sold for taxes attempted to be levied thereon for 1896, after becoming delinquent in 1897. If offered for sale in 1897, on such tax and bid in for the state, and the county auditor, without direction from the state auditor, assigns the certificate to one who pays the amount for which it sold, and subsequent taxes, and thereafter procures a deed from the auditor, such deed is not authorized and conveys no title. *Patton v. Cass County*, 351.
19. In an equitable action to set aside a tax sale and cancel an assessment, absence of the assessor's affidavit from the assessment roll does not invalidate the sale or levy. *Douglas v. Fargo*, 467.
20. The omission to attach the assessor's affidavit to an assessment roll is an illegal act, and renders such assessment void in an action at law; but such omission will not invalidate an assessment where there is no allegation that the assessment was unjust, unfair or fraudulent, in an equitable action to cancel sales or certificates or taxes made, issued or levied under such assessment. *Douglas v. Fargo*, 467.
21. Courts of equity should, in general, interfere to restrain the collection of a tax or annul tax proceedings only where it appears either that the property sought to be taxed is not subject to taxation, or the tax itself is not wholly authorized by law, or the taxes are assessed or levied by unauthorized persons, or the taxing officers have acted fraudulently, or the taxes have been unjustly levied, or

TAXATION—Continued.

the assessment made unjustly or without uniformity; and the plaintiff must, in addition, bring himself within some recognized head of equity jurisprudence, and must also tender or pay the taxes justly chargeable upon his property, before an injunction should issue to restrain the collection of the taxes, unless statutory provisions make such tender unnecessary. *Douglas v. Fargo*, 467.

22. In an equitable action to cancel and set aside tax sale and levy, complaint must show a tender of taxes justly due. *Douglas v. Fargo*, 467.
23. Where a part of the tax is legal and a part illegal, the legal portion must be tendered as a condition to equitable relief. *Douglas v. Fargo*, 467.

TAXPAYER. See **COUNTY COMMISSIONERS**, 610.

TENDER.

1. A wife claiming a homestead under her husband's contract for the purchase of land, has no greater rights to such land as a homestead than her husband would have under such contract. A husband cannot demand a deed of such land without a compliance with the contract nor can a wife demand a deed of such land until she has tendered a performance of the terms of such contract, in cases where the husband has abandoned the contract and the land. *Helgebye v. Dammen*, 167.
2. In an equitable action to set aside a tax or cancel an assessment, if the complaint or evidence shows that a portion of the tax is legal and the amount ascertainable, and a part illegal, a court of equity will not restrain the collection of the illegal portion, except upon the condition that the legal portion has been paid or tendered. *Douglas v. Fargo*, 467.
3. In an equitable action to cancel and set aside a tax sale and levy, the complaint must show payment or tender. *Douglas v. Fargo*, 467.
4. A tender of the amount necessary to redeem from chattel mortgage sale, must be made as prescribed by section 3814, Rev. Codes 1899. *Brown v. Smith*, 580.

TITLE. See **ADVERSE CLAIMS**, 199; **EVIDENCE**, 411; **HOMESTEAD**, 426.

1. In ejectment plaintiff recovers on strength of his own, not the weakness of defendant's title. *Conrad v. Adler*, 199.
2. Plaintiff failing to show any title or interest in himself, judgment of dismissal was proper. *Conrad v. Adler*, 199.
3. Sale of homestead by sheriff upon execution conveys no title to the purchaser. *Johnson v. Twichell*, 426.

TOWNSHIPS.

1. A township is not liable for the loss suffered by a land owner by the increased flow of surface water upon his land, resulting solely from the improvement of a highway in the ordinary manner without negligence. *Carroll v. Rye Township*, 458.
2. Whether or not any liability would ensue if the surface water had been diverted from a definite channel is not decided. *Carroll v. Rye Township*, 458.

TRIAL.

1. Under the facts in the opinion, where three amendments to the complaint had occurred during the trial, it was not error to deny request for further amendment after the trial. *Conrad v. Adler*, 199.
2. Permitting leading questions and limiting cross-examination rest very largely in the discretion of the trial judge, and his action will not be disturbed in the absence of manifest abuse of such discretion. *Josephson v. Sigfusson*, 312.
3. A party cannot sit by and permit an incompetent or improper question to be asked without objection, and, when he finds the answer against him move to strike out the answer. *Hogan v. Klabo*, 319.
4. A cross-examination is proper though it calls for facts not testified to on direct examination, but relating to the same subject matter and bearing upon the main facts toward which the examination in chief was directed—facts which give to the direct testimony the effect of false testimony. *Hagen v. Klabo*, 319.
5. Objection to evidence on the ground of variance must be supported by proof that the objection was misleading to his prejudice. *Halloran v. Holmes*, 411.
6. A party to an action has no right to read excerpts or isolated portions of a deposition on the trial of an action. *Gussner v. Hawks*, 454.

TRIAL BY JURY. See JURY, 131.

TRUST. See EVIDENCE, 411.

1. The land in dispute was wrongfully conveyed by the apparent but real owner, to H who was only a nominal grantee to hold the title as trustee for a third party, who was the real buyer, and who paid the entire cash portion of the purchase price, and agreed to pay the remainder; held, that as against the rightful owner of the land H was not a bona fide purchaser, but was a mere passive trustee for the real purchaser, even though H signed a note and mortgage on the land to the seller for the unpaid portion of the purchase price. *Halloran v. Holmes*, 411.

ULTRA VIRES. See COUNTY COMMISSIONERS, 610.

1. Where a contract of a board of county commissioners is ultra vires, delay on the part of a resident tax payer in restraining expenditures under it is not laches. *Fox v. Walley*, 610.

USURY. See PLEADING, 604.

1. Under section 406, Rev. Codes 1899, prescribing the amount recoverable when usurious payments have been made, plaintiff may recover double the amount of all interest payments made, and not merely the excess over the lawful rate. *Waldner v. Bank*, 604.

VENDOR AND PURCHASER. SEE SPECIFIC PERFORMANCE, 1; HOMESTEAD, 167.

1. A homestead may be claimed on land resided upon, when the right to residence upon such land is based upon an oral contract for the purchase of such land, followed by occupancy under such contract, and a part performance thereof. *Helgebye v. Dammen*, 167.
2. A forfeiture of a written contract of sale of real estate by the vendor upon defaults in payments required to be made "in the manner and times specified for their payment," and the amounts to be paid being evidenced by promissory notes due on fixed dates, will not be upheld in a court of equity, where the evidence shows that time had not been treated by the vendor as of the essence of the contract, in respect to defaults relied on for a forfeiture. *Coughen v. Larson*, 373.
3. Where a contract for the sale of land specified what defaults shall be grounds for the forfeiture of the same by the vendor, a forfeiture of such contract upon other grounds, not included as grounds for the forfeiture in the contract, will not be upheld. *Coughan v. Larson*, 373. ♦
4. Under section 3936, Rev. Codes 1899, providing that "a contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise," a written contract for the sale of real estate cannot be modified by an unexecuted oral agreement, although the modification pertains only to the performance of the contract. *Coughan v. Larson*, 373.
5. A vendor who has agreed to convey land by contract of sale must act promptly upon default if he would cancel the contract. *Timmons v. Russell*, 487.
6. Where the wife is the vendee in an executory contract for the purchase of land, the fact that her husband works for her upon the land does not prove that he has any interest in the crop so that a mortgage given by him will create any lien thereon. *Thurston v. Osborne-McMillan Co.*, 508.
7. Where the vendor in a contract for the sale of land reserves title in all crops until the performance of certain conditions, the relinquishment of the vendee of all the vendor's interest in the crops vests the title in such vendee, and a chattel mortgage previously given by the latter will attach. *Thurston v. Osborne-McMillan Co.*, 508.
8. A written contract for the sale of real estate may be annulled by parol, or abandoned by the parties thereto. *Haugen v. Skjerheim*, 616.

VENDOR AND PURCHASER—Continued.

9. Evidence received and held to show an abandonment of a written contract for the sale of real estate, and not to show an estoppel. *Haugen v. Skjerheim*, 616.

VENUE, CHANGE OF. See **CONSTITUTIONAL LAW**, 131; **JURY**, 131; **CRIMINAL LAW**, 368.

1. An order granting a change of venue is an appealable order. *Robertson Lumber Co. v. Jones*, 112.
2. Plaintiff applied for a change of venue for convenience of witnesses, basing such application upon the files and its managing agent's affidavit setting forth the names of the witnesses, their residence, and that they were necessary, which was uncontroverted; held, that the court did not abuse its discretion in ordering the change. *Robertson Lumber Co. v. Jones*, 112.
3. The "right of trial by jury" as fixed in the constitution is subject to the change of place of trial at the instance of the state, when necessary to secure a fair and impartial trial and it was the right thus known and understood which is secured by the constitution. *Barry v. Traux*, 131.
4. The statute authorizing a change of the place of trial in criminal cases upon the application of the state, does not violate the right of trial by jury as secured by section 7 of the state constitution. *Barry v. Traux*, 131.

VERDICT. See **EVIDENCE**, 559.

1. A verdict should not be directed when there is a substantial conflict in the evidence upon a material issue. *Pewonka v. Stewart*, 117.
2. A verdict finding the defendant guilty of assault with a dangerous weapon, with intent to do bodily harm, does not warrant a judgment and sentence for the felony defined in section 7145, Rev. Codes 1899, as an attempt to shoot with intent to do bodily harm. *State v. Cruikshank*, 337.
3. To justify a judgment notwithstanding the verdict it must appear, not only that the verdict is not justified by the evidence, but it must also appear that there is no reasonable probability that the defects in the proof necessary to support the verdict may be remedied upon another trial. *Meeham v. Gt. Northern Ry. Co.*, 432.
4. In returning a general verdict the jury apply the law to the facts, and pronounce generally upon all of the issues. In a special verdict they "find the facts only," and the trial judge determines their legal effect. *Morrison v. Lee*, 591.
5. It is error to instruct a jury to return as a part of special verdict, whether the plaintiff "was guilty of such contributory negligence as would bar him from recovery under the law as laid down in the instructions." *Morrison v. Lee*, 591.

VERDICT—Continued.

6. The denial of a motion to direct a verdict is not available as error when further testimony is introduced and the motion is not renewed. *Ward & Murray v. McQueen*, 153.

VOTERS AND ELECTIONS. See **ELECTIONS**, 406, 420.**WAIVER.**

1. Payment of a judgment under coercion or duress does not waive the right to appeal therefrom. *Signor v. Clark*, 35.
2. Payment of a judgment without express understanding as to waiver, or reservation of the right to appeal, waives such right. *Signor v. Clark*, 35.
3. Where a written executory contract of sale specifies the terms under which delivery shall be made, delivery is not shown as a matter of law by pointing out the property in a deliverable condition, nothing being said or done to show a waiver of some of the conditions under which the delivery was to be made. *Reeves & Co. v. Bruening*, 157.
4. Although defendant's arrest is void, because of no sufficient showing of probable cause on oath, he waives the jurisdiction of the committing magistrate by giving bail, procuring adjournments and change of venue. *State v. McLain*, 368.
5. The vendor, who has given a contract, who fails to act promptly upon a default in its terms, waives his right to cancel it. *Timmins v. Russell*, 487.
6. Section 4988, Rev. Codes 1899, prescribing the rule of damages upon failure to accept and pay for personal property, the title to which is not vested in the vendee, is not applicable as a rule of damages where the property has been delivered to the vendee. In the latter case the vendor may waive the provision as to title and elect to sue for purchase price, and the bringing of an action for the purchase price is such waiver. *Dowagiac Mfg. Co. v. Mahon*, 516.

WAGER. **GAMING**, 639.**WARRANTY.**

1. A written warranty that "it is understood that the goods are warranted only against breakage caused by manifest defects in material," etc., excludes all other warranties. *Dowagiac Mfg. Co. v. Mahon*, 516.

WATER AND WATERCOURSES.

1. A township is not liable for the loss suffered by a land owner by increased flow of surface water upon his land, resulting solely from the improvement of a highway in the ordinary manner without negligence. *Carroll v. Rye Township*, 458.
2. Whether or not any liability would ensue if the surface water had been diverted from a definite channel is not decided. *Carroll v. Rye Township*, 458.

WILLS.

1. A testamentary disposition of property can be made only by will. *Moore v. Weston*, 574.

WITNESSES. See CRIMINAL LAW, 368; PRACTICE, 383.

1. It is within the discretion of the trial court to exclude witnesses while other witnesses are testifying. *King v. Hanson*, 85.
2. A general agent is a competent witness as to his authority when it is not in writing. *Reeves & Co. v. Bruening*, 157.
3. Where a witness not subpoenaed, but who promised to attend the trial, fails to attend, owing to sickness, such sickness becoming known to defendant during the trial, his failure to attend is not ground for granting a new trial, under subdivision 3 of section 5472, Rev. Codes 1899, making "accident or surprise which ordinary prudence could not have guarded against" a ground for a new trial, when no motion for a continuance was made after witness' sickness became known. *Josephson v. Sigfusson*, 312.
4. Where an accused has given bail to appear for preliminary examination before a magistrate and voluntarily absents himself but is represented by counsel, he cannot object that he is deprived of the right to be confronted by his witness. *State v. McLain*, 368.
5. Opinions of expert witnesses as to which of two or more causes produced a given effect are not admissible when the conditions can be so described that a jury can understand them and intelligently form an opinion. *Meehan v. Gr. Northern Ry. Co.*, 432.
6. An instruction that the testimony of a witness having in view a reward in case of conviction shall be received with distrust, is properly refused, the witness' credit is solely for the jury. *State v. Wisnewski*, 649.
7. It is not error for the trial court to read the statute to the jury, providing that a prisoner's failure to become a witness in his own behalf shall be considered by the jury. *State v. Wisnewski*, 649.

"WOODS LAW." See TAXATION, 284, 288.

WORDS AND PHRASES.

1. The word "assign," as used in section 3265, Rev. Codes 1899, does not include the indorsee of negotiable paper who takes the same before maturity, for value, and without notice of defense thereto. *Bank v. Pick*, 74.
2. The word "place," as used in section 7605, Rev. Codes 1899, relating to liquor nuisances, means the particular room, tenement or apartment, wherein the unlawful business is done, or the liquor is kept for sale or sold. *State v. Nelson*, 122.
3. "The right of trial by jury," which is secured to all by section 7 of the state constitution, includes the substantial elements of the trial by jury as they were known to and understood by the framers of the constitution and the people who adopted it. *Barry v. Traux*, 131.

WORDS AND PHRASES—Continued.

4. The words "duly entered" used with reference to a judgment, and "duly given," used with reference to a notice of sale, in a stipulation in an action submitted thereon for decision, will warrant a finding that all jurisdictional acts necessary to sustain the judgment were performed, and all acts constituting a notice of sale were done and performed as required by law. *Purcell v. Farm Land Co.*, 327.
5. Sections 7115, 7145, Rev. Codes 1899, construed and held, that the class of acts described as "assault and battery" with any deadly weapon, etc., in section 7115, and by the terms "assault or assault and battery" with any sharp or dangerous weapon, in section 7145, does not include an assault or assault and battery with firearms for the purpose of shooting. *State v. Cruikshank*, 337.
6. The word "wrongful," used in defining robbery, is equivalent to "felonious." *State v. Fordham*, 494.
7. The procedure to procure an order restraining the foreclosure of a mortgage by advertisement is not a "special proceeding," within the meaning of the code. *Tracy v. Scott*. 577.

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